Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1255

UNITED STATES OF AMERICA,

Petitioner,

—v.—

CHARLES J. ASH, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1255

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES J. ASH, JR.

PARTY NO. 1: JOHN L. BAILEY

PARTY NO. 2: CHARLES J. ASH, JR.

Charge: Ent. Bank W/Int. To Com. Rob.; Tak. Mon. Bel. To And In Cust. And Cont. Of Bank, Robbery (18 U.S.C. 2113(a), 22, D.C.C. 2901)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
April 1	No. 1 and 2: Presentment and Indictment Filed (5 Counts).
April 6	No. 2: Copy of Indictment given to Deft. Cert. filed.

DATE		PROCEEDINGS
April 15	No. 2:	Bench Warrant Ordered and Issued. Sirica, J.
April 18	No. 2:	Bench Warrant issued 4-15-66 returned executed; Deft. committed to D. C. Jail. Commitment Issued.
April 19	No. 2:	Record of Proceedings before Sam Wertleb, 4-18-66 for the purpose of Bail Only. Bail Set at $5000.00. Defendant Committed to D C Jail. Commissioner's Final Commitment filed.
April 22	Nos. 1 and 2	Arraigned, Plea Not Guilty entered;
	No. 1:	Case is referred for appointment of counsel;
	No. 2:	Defendant Remanded to the District of Columbia Jail. Attorney Irwin B. Lipman present.
		Curran, J. (Reporter—J.C. Blair) Cert. filed.
June 20	No. 2:	Order Vacating Irwin B. Lipman, and Appionting John Dwyer, 602 5th St., N.W., as counsel to defend. filed.
June 20	No. 2:	Oral Motion of Mr. Lipman to vacate his appointment due to his health granted; Case is referred for appointment of new counsel. Cert. filed. Attorney Irwin B. Lipton present. Deft. not present. McGuire, C. J. (reporter—Dawn T. Copeland).
June 24	No. 2:	Motion of Defendant for an Order remanding action for a preliminary hearing and an Order permitting inspection of the Grand Jury Minutes, filed c/s.

DATE		PROCEEDINGS
July 1	No. 2:	Motion to remand this action for preliminary hearing and to inspect the Grand Jury minutes is argued and denied as to remand for preliminary hearing and taken under advisement as to permission being allowed for the inspection of Grand Jury minutes. Defendant remanded to District of Columbia Jail. Attorney John J. Dwyer present for defendant. Bryant, J. (Rep. Elaine O. Wells) Certificate filed.
July 15	No. 2:	Letter from defendant in the nature of motion for appointment of counsel and for withdrawal of present counsel heard and denied. Defendant Remanded (Reporter: J. Blair) C/F John Dwyer, attorney for defendant present McGarraghy, J.
July 20	No. 1, 2:	Trial date changed from August 9 to August 24, 1966. Jones, J. (Reporter —S. Hatch)
July 20	No. 2:	Order granting motion to permit inspection of the Grand Jury minutes to the extent of an in camer inspection by the Court, Filed. (N) Bryant, J. (Micro 7-21-66).
August 12	No. 2:	Motion of Defendant for Mental Examination, filed. Cert. of Serv.
Aug. 18	No. 2:	Motion of Deft. for mental exam. heard and Granted. (Order to be presented) Defendant remanded to D C Jail; Attorney John Dwyer present; Bryant, J. (Reporter—P. Mallon) Cert. Filed
Oct. 24	No. 2:	Letter dated 10-21-66 from St. Elizabeths Hospital advising that Defendant is Competent for trial, filed. Copy to Atty.

DATE		PROCEEDINGS
Nov. 2	No. 2:	Case called for mental competency hearing; Order finding defendant Mentally Competent to stand trial, filed. (n) Oral motion of Reuben Bonnett for leave to withdraw as counsel granted. Referred for appointment of John A. Shorter, Jr. to defend (Order to be presented); Defendant Remanded to the District of Columbia Jail; Attorney Reuben Bonnett and John Shorter, Jr., present. Curran, C.J. (Reporter—Maloney)
Nov. 9	No. 2:	Motion of Defendant for speedy trial filed (Prepared by Defendant)
Nov. 18	No. 2:	Motion of Defendant for speedy trial, filed (Prepared by Defendant)
Nov. 30	No. 2:	Motion of Attorney for leave to withdraw as counsel, filed. C/S
Dec. 2	No. 2:	Motion of defense counsel to withdraw from case withdrawn by praecipe; motions of defendant to dismiss and for a speedy trial heard, argued and taken under advisement; Defendant remanded to D C Jail; Attorney J. Shorter present;
Dec. 5	No. 2:	Order denying motion of Defendant to dismiss and denying motion for a speedy trial without prejudice, filed (N) Matthews, J.
Jan. 6	No. 2:	Motion of Defendant for speedy trial, filed (Prepared by Defendant)
Jan. 23	No. 2:	Order dated 1-20-67 vacating appointment of John A. Shorter, Jr., as counsel to defend, filed. Curran, C.J.

DATE		PROCEEDINGS
Jan. 27	No. 2:	Motion for speedy trial, filed by defendant, Denied; Case is set for trial next week; Defendant remanded to D C Jail; Attorney Sol Rosen present.
Feb. 8	No. 2:	Motion of Defendant for dismissal of Indictment for lack of speedy trial, filed. (Prepared by Deft. (N)
Feb. 10	No. 1:	Motion of Deft. for speedy trial, filed (Prepared by Deft) (N)
Feb. 24	No. 1:	Motion for speedy trial (by deft) continued one week; Defendant Bailey not present. Co-deft. represents to the Court Deft. Bailey is in D C Jail);
	No. 2:	Motion for dismissal of indictment for lack of speedy trial heard and denied; Defendant remanded to DC Jail;
	No. 1:	Attorney Robert J. Stanford present;
	No. 2:	Attorney Sol Z. Rosen present;
Mar. 15	No. 2:	Petition of defendant for writ of Mandamus (In nature of a motion to dismiss indictment, for speedy trial, and for due process of law), filed.
Mar. 15	No. 2:	Oral motion of defendant to set definite trial date heard and denied; Attorney Sol Rosen present; Curran, C J (Reporter—B.A. Williamson)
1967		
Mar. 17	No. 1:	Motion of defendant for speedy trial heard and Denied; Defendant remanded to D C Jail; Attorney R J Stanford Present; Order denying motion, filed (N) Sirica, J (Reporter—N. Sokal) (Micro 3-21-67).

DATE		PROCEEDINGS
April 7	No. 2:	Petition for Writ of Mandamus (in nature of a motion to dismiss, for speedy trial and for due process of law (by Deft.) (Cont. three (3) weeks due to illness of Govt. Attorney). Deft. remanded to the DC Jail; Attorney Sol Rosen present. Gasch, J (Reporter—Elaine O. Wells) Cert. filed.
April 28	No. 2:	Motion for writ of mandamus Denied; Defendant remanded to D C Jail; Attorney Sol Rosen present;
July 10	No. 2:	Oral motion of defendant for continuance in order that defendant may be re-examined at St Elizabeths Hosp. for psychiatric examination and/or evaluation heard and granted, (Order to be presented); Defendant remanded to the District of Columbia Jail; Attorney Sol Rosen present. Hart, J. (Reporter—I. Watson).
Sept. 11	No. 2:	Letter from St. Elizabeths Hosp. dated 9-7-67 stating that Charles Ash is without mental disease or defect and competent for trial, filed (N)
Sept. 18		Mental competency hearing. Def. found mentally competent to stand trial. Attorney Sol Rosen present. Curran, C J (reporter J. Blair).
1968		
April 5	No. 2:	Oral motion of counsel for defendant, Sol Rosen, Esq., for leave to withdraw heard and denied. Curran, C J Reporter Jack Maher (Micro. 4-8-68). Cert. filed.

DATE		PROCEEDINGS
April 10	No. 1, 2:	Trial date continued to 5-7-68 at request of attorney for Govt. No. 1 Attorney (not present) No. 2 Attorney Sol Z. Rosen present. Waddy, J. (Reporter E. Kaufman and J. Blair).
May 8	No. 1, 2:	Case called for trial; hearing on admissibility of in-Court identification begun and concluded; trial to begin 5-9-68 Rem Robt. J. Stanford, Esq. Sol Z. Rosen, Esq. Gasch, J. Rep. D. Duschaine C/F
May 9	1, 2:	Jurors sworn on voir dire; jury and 4 alternate jurors sworn; trial begun; respited to May 10, 1968 at 11 a.m. Rem # 1 Robert J. Stanford, Esq. # 1 Sol Z. Rosen, Esq. Gasch, J. Rep. D. Duschaine C/F
May 10	1, 2:	Trial Resumed; same jury and 4 alternate jurors; respited to May 13, 1968 at 10 a.m. REM. 1. R. J. Stanford, Esq. 2. Sol Z. Rosen, Esq. Gasch, J. Rep. D. Duschaine C/F
May 13	1, 2:	Jurors report at 10 a.m.; Juror # 2 William T. Thomas, not present and is excused; Alternate juror # 1, Miss Johnnie R. Kirkland, takes seat # 2; 3 remaining jurors discharged; jury begins deliberations; Verdict: Guilty as charged as to Deft. # 2 (Ash); jury polled; Unable to agree as to deft # 1 (Bailey) jury discharged. # 2 Case referred to Probation Officer of the Court Rem Notes (3) from jury. 1: R J Stanford, Esq. 2: Sol Z. Rosen, Esq. Gasch, J. Rep. M J Maloney C/F

DATE		PROCEEDINGS
May 29	1:	Motion for Judgment of Acquittal; Order granting motion for Judgment of Acquittal. Release issued. (N) Gasch, J. (Rep. Duschaine-A.M. Taylor-P.M.
June 21	2:	Sentence: 30 months to 20 years on Counts 1 & 4; 5 years to 15 years on Counts 2, 3, & 5, said sent. by the counts to run concurrently, but consecutively with any sentence heretofore given in federal and state proceedings. Rem. Copy of Memorandum from LAA.
June 25	No. 2:	J & C Gasch, J.
July 2	2:	Mo for notice of appeal and Affidavit (2) in support thereof c/s Pro Se.
Aug. 21	2:	Order authorizing deft to appeal in f.p. . . . directing transcript be furnished at govt. expense, except voire dire and final argument; referring case to USCA for appt of counsel Gasch, J (N)
Sept. 10	2:	Copy of Appeal given to USCA & U S Atty.
Oct. 2	2:	Cert copy of order USCA 9-27-68 appointing Jerome J. Dick and extending time to file record until tr is filed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 355-66

[FILED JAN. 28, 1969, Robert M. Stearns, Clerk]

Washington, D. C.
Wednesday, May 8, 1968

UNITED STATES OF AMERICA

v.

JOHN L. BAILEY AND CHARLES J. ASH, DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

* * * *

DUANE E. DUSCHAINE
Official Reporter
United States District Court
For the District of Columbia
Washington, D. C. 20001
783-5700 Ext. 7108

* * * *

[fol. 6] DEFENDANT ASH: I filed a number of motions to ask for a speedy trial. Someone had asked for a [fol. 7] continuance. I never asked for a continuance in this matter. I had a motion for dismissal for lack of a speedy trial, and counsel would not argue. I have been called before the Court—

THE COURT: Has the motion for a speedy trial been brought to the attention of the Court?

MR. ROSEN: Five times, Your Honor, the record of the jacket will so reflect and denied, and I believe once by Judge Matthews, and one by Judge Hart and one by Judge Walsh.

DEFENDANT ASH: If Your Honor will check the records, you will see what I mean, that my motions were not argued by counsel. I just don't know. I was never brought into Court, and I don't know what ever tran-

spired. I was never brought in the courtroom during the proceedings.

* * * *

[fol. 11] THE DEPUTY CLERK: The case of the United States versus John L. Bailey and Charles J. Ash, Jr., Criminal No. 355-66; Mr. Sepenuk for the Government, Mr. Stanford and Rosen for the Defendants.

MR. STANFORD: Ready for the defense.

MR. SEPENUK: Ready for the United States, Your Honor.

MR. ROSEN: Ready, Your Honor.

THE COURT: I think in view of what counsel has previously stated, we will at this time proceed with the Stovall hearing.

Mr. Stepenuk, do you wish to call your witnesses on this point?

MR. STEPENUK: Yes, Your Honor, I do.

MR. ROSEN: Your Honor, may I have a rule on witnesses?

THE DEPUTY CLERK: Will all witnesses retire to the witness room till called. Please accompany the Marshall.

MR. STEPENUK: Do you want this witness to go back? Can he stay?

THE COURT: The first witness may remain.

[fol. 12] Whereupon,

L. PATRICK MARKOWVICH

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEPENUK:

Q State your full name and address for the record, please?

A L. Patrick Markowvich, Los Vegas.

MR. ROSEN: Keep your voice up.

Q You are an agent for the Federal Bureau of Investigations, is that correct?

A Yes, sir.

Q Would you repeat your last name?

A Markowvich.

Q Was your office formerly in Washington, D. C.

A Yes.

Q Were you in Washington, D. C., on duty on August 26, 1965?

A Yes, sir.

Q Were you assigned to investigate the robbery which [fol. 13] took place at the American Security and Trust Company, East Capitol Branch?

A Yes, I was.

Q And in the course of your duties did you ever have occasion after the robbery to interview certain witnesses?

A Yes, sir.

Q What was the purpose of these interviews?

A To attempt to effect an identification.

Q Specifically on February 3, 1966, with that in mind, did you interview Mrs. Ruby Paugh, Mrs. Jean Major, Mr. Joseph Taylor and Miss Betty Apple?

A Yes, sir, I did.

Q And would you kindly tell us what procedure you went through to obtain an identification or lack of identification at that time?

A I exhibited a group of five photographs to the persons you have named.

Q Did you do each person individually?

A Yes, sir, I did.

Q Now, continue, please.

A After observing the pictures, Mrs. Paugh, Mrs. Major, Mr. Taylor and Miss Apple selected the photo- [fol. 14] graphs of Charles Ash as being the person they had seen in the bank waving a gun. Mrs. Apple also selected a photograph of John Lee Bailey as the person she had seen running outside the bank.

Q Tell us about the five photographs—by the way, do you have the photographs present?

A No, sir, I do not.

Q Did you attempt to find them?
A Yes, sir, I did.
Q With what result?
A I was unable to locate them.
Q Now, can you tell us what those photographs looked like generally?
A They were mug shots from the Metropolitan Police Department of five negro males, generally the same age, height, and weight as Mr. Bailey and Mr. Ash.
Q And did you also have occasion to interview Miss Betty Apple on February 18, 1966?
A Yes, sir, I did.
Q And tell us where that took place?
A At the Court of General Sessions.
Q And what happened at that time?
A Miss Apple was requested to walk in the corridor [fol. 15] of the Court of General Sessions and asked if she recognized any person or persons that she had seen in the bank on August 26.
Q Then what happened?
A Miss Apple went in and pointed out an individual who was in a group of individuals and she stated the man who nodded his head, stated the man was wearing a raincoat, was now lighting a cigarette, and the same individual that she observed running outside the bank.
MR. STEPENUK: I believe that is all, Your Honor.
THE COURT: Counsel may inquire.

CROSS EXAMINATION

BY MR. ROSEN:

Q Agent Markowvich, did I understand you, you stated you showed five photos to Mrs. Paugh, Mrs. Major and Miss Apple, and Mr. Taylor, those four people?
A Yes, sir.
Q All four people were positive of the identification of Mr. Ash?
A They were not positive in the identification at that time.
Q Let's break it down to four people:
Were any of the four positive of their identification?

[fol. 16] A Mr. Taylor said that to the best of his belief, Mr. Ash was identical, but he said he could positively if he could see him in person.

Q Do your records show as to whether he ever saw him in person?

A I do not believe so.

Q Now, Miss Apple, she also said she wasn't sure it looked like him?

A Yes, sir.

Q All right. Now, did you proceed one step back, you say you had five photographs, is that right?

A Yes, sir.

Q Do your records or notes reflect the names of these five, the other three people?

A Yes, sir, they do.

Q What are their names?

A Clifton Gregory, Robert Lee Willis, Theodore Clemens.

Q Now, let me ask you, you are going—going back to the day of the event, you were in your office at the time of the robbery in Washington, D. C.?

A I was in Washington, D. C.

Q I take it you were assigned to investigate this robbery, is that correct?

[fol. 17] A Yes, sir.

Q All right. Did you work alone when you investigated the robbery?

A There were a number of agents at the bank after the robbery.

Q All right. I take it at the time you spoke to various witnesses as to the description of the people who alleged robbed this bank, is that correct?

A Yes, sir.

Q All right. Now, based on this description you got, did you at any time before this date in question, I believe you said it was February 3rd, 1966, did you at any time, these four people you named, Mrs. Paugh, Mrs. Major, Mr. Taylor, and Miss Apple, ever witness any photographs of either Mr. Ash prior to the showing of these photographs?

A No, sir, not to my knowledge.

Q Did you attempt to find them?
A Yes, sir, I did.
Q With what result?
A I was unable to locate them.
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A No, sir, not to my knowledge.

Q They were never called down to headquarters and shown a row of five photographs or at FBI headquarters to identify any possible male subjects fitting the description.

A Not to my knowledge. I am not certain about this. I cannot state, I went to the robbery squad or not.

Q Can you tell us with certainty as to whether on the [fol. 18] 3rd, either of these people you mention had ever seen any photographs of Mr. Ash?

A To my knowledge, they had not.

Q All right. Now, am I also safe in saying that primarily you included the picture of Mr. Ash in the group because of the testimony given by Clarence McFarland, is that so?

A Yes, sir.

Q Now, can you tell us, approximately, you cannot locate the pictures of Mr. Gregory, Mr. Willis or Mr. Theodore Clemens?

A No, sir.

Q Were these all color slides or color photographs?

A No, sir, they were black and white.

Q You made no attempt or effort at the time to keep in your record or make any notes of them?

A I had them. I don't know what happened to them after I left.

Q Can you tell me, approximately, were the mug shots of the face or the whole body?

A Mug shots of the face.

Q In other words, to the people, if you presented or showed them a mug shot, let's say, of Mr. Willis, just by knowing—seeing his face, they would not know anything about how tall he was, is that so?

[fol. 19] A That is correct.

MR. ROSEN: May I have the Court's indulgence just one moment, Your Honor?

THE COURT: Yes, sir.

MR. ROSEN: Your Honor, for the purpose of the record, there was a recent case of the Court of Appeals, but I cannot recall the name, it was addicted to the effect that it called upon police, that it be made a part of the record in any example, the question of a motion to suppress.

I have subpoenaed, Your Honor, the Communications Division of the transcript of the dictaphone as far as this robbery, and I would ask that it be marked at this time.

THE COURT: All right.

MR. ROSEN: And be made a part of the record.

THE COURT: All right.

THE DEPUTY CLERK: Defendant Ash's Exhibit 1 marked for identification.

(Defendant's Ash's Exhibit No. 1 was marked for identification.)

MR. ROSEN: Your Honor, I have given a copy to Mr. Sullivan. I don't know if Mr. Sepenuk has seen it.

MR. SEPENUK: No, I haven't.

[fol. 20] THE COURT: All right, sir, show it to him. While counsel is reading it, I will invite the Jury in in the previous case and dispose of that matter.

Counsel come to the Bench, please.

MR. ROSEN: Which case?

THE COURT: The previous case.

(Short recess.)

THE COURT: Have you had an opportunity of reading the communication?

MR. SEPENUK: Yes, Your Honor.

THE COURT: All right.

MR. SEPENUK: I might say I had a chance to read that, and I am in doubt for the purpose of that document.

THE COURT: I think I understand.

MR. ROSEN: My problem is mainly this, Your Honor, the reason I wanted this, I believe the officer testified three of the people were shown mug shots.

THE COURT: Yes.

MR. ROSEN: The identifications on the police call goes mainly to height and weight, and that there was a lookout, for example, No. 1 negro male, 19, six foot, 165, thin build, and then it goes on and says the identi-

[fol. 21] fication given at the time was mainly by height and weight and appearance rather than a facial description.

THE COURT: I understand.

MR. ROSEN: I think it is quite relevant that these people were not asked to identify the other three photographs, Mr. Gregory, Mr. Willis or Mr. Clemens, and if these were all mug shots, these people might not have any idea whether or not they also had the same build or appearance as Mr. Ash or Bailey. It is conceivable either one of them, although I think if I am not mistaken, I think the Court could strike Mr. Gregory at this time.

THE COURT: I tried Mr. Gregory for first degree murder.

MR. ROSEN: That is what I was going to say, I don't know what type of—

THE COURT: It is a pretty good likeness to Mr. Gregory. He is tall and fair, and I would say it would reasonably fit the description. Whether his face is comparable to the face of those accused in this case, I would have a question about it. I don't remember his face.

MR. ROSEN: I simply call it to the Court's attention. I don't know anything about this Theodore Clemens [fol. 22] or Mr. Willis, but it is highly conceivable or highly possible it might not fit the general description as to height, weight, and appearance as to Mr. Ash.

I think that the Court is making this determination, particularly under Simmons and Stovall as to whether the photographs themselves were suggestive in a sense was this really a cross section.

As I read Simmons, which really is—Simmons relies on Stovall, and I think it is appropriate language, Your Honor. I think, for example, I call to the Court's attention the language of Mr. Justice Harlan on page 4 of the slip opinion, he goes on, "Even if the police subsequently follow the correct photograph identification and proceed to show him the pictures of a number of individuals without indicating whom they did suspect, there is some danger the witness may make an incorrect identification. This danger increases as the police display to the witness only the picture of a single individual who generally resembles the person they saw, and if they show them several persons among which a photograph

of a single such individual recurs or in some way emphasized. Chances of this identification is also heightened when the police indicate to the witness they have other evidence that one of the persons pictured committed the crime.

[fol. 23] It goes on to illustrate various ways as to how to show pictures, and the pictures can be suggestive of the people arrested.

Now, one of my proffers is basically that in light of that fact that as I read this record of the broadcast, that the main thing that was stressed in the mind of the victim, the complainant, was the build and on the appearance. I show this to the Court, which is clearly—this was the information given to the police, the height, the slender build of the people who robbed them rather than the face and facial features.

It would seem to me, the crux of my proffer, Your Honor, I don't think that merely showing the mug shots of five people would necessarily show a cross section such that the people could have a chance to identify the persons involved in this crime.

THE COURT: Well, the three criteria mentioned by Mr. Justice Harlan in the excerpt you read to the Court, the three criteria are as follows:

Single picture? No, he showed five pictures.

Was the picture in some way emphasized by recurring, that is to say, were the two pictures of the same man, and the answer to that is "no".

[fol. 24] The third criteria mentioned by the Justice is whether or not the FBI or law enforcement officials told any of the witnesses—

MR. ROSEN: That they have other evidence.

THE COURT: —that they had other evidence.

As I understood the witness's response to that, he did not make such a statement. Perhaps I am incorrect.

MR. ROSEN: Let me ask him.

BY MR. ROSEN:

Q Let me ask you, where did these people see these photographs?

A The two bank ladies were exhibited the photographs separately at the bank in a little room to the rear of the bank.

Q That was Mrs. Paugh and Mrs. Major?

A Mrs. Paugh and Mrs. Major.

Q Let me ask you this: At that time, did you in any way indicate to them or tell them the purpose of viewing the photographs?

A As I recall, I probably told them to look at the photographs and see if they recognized anyone in these photographs.

Q Well, did you tell them that it was specifically to identify someone in this particular robbery?

[fol. 25] A In the robbery of the bank, yes, sir.

Q I see. All right. Did you mention anything else about the crime to them?

A No, sir.

Did you at all tell them their names of the people involved?

A No, sir.

Q Did you tell them the general description or height, weight, appearance, was a slender build or stocky, or anything like that?

A No, sir.

Q All right. Where did you show Mr. Taylor or Miss Apple?

A Yes, sir.

Q Mrs. Apple, where did you show those photographs?

A Miss Apple at the time was employed at the Savarin Restaurant at the Union Station.

Q All right. What about Mr. Taylor?

A Mr. Taylor was at his residence.

Q All right. Now, did there ever come—now, to your own personal knowledge—let me rephrase the question.

Do you have any personal knowledge whether Mr. Gregory, or Mr. Willis or Mr. Clemens fitted the general description of Mr. Ash?

[fol. 26] A As I recall, they generally do, yes, sir.

Q Do you know any reason why, for example, these people weren't called down, either down to police headquarters or to the FBI to identify a greater number of photographs?

A No, sir, I do not.
Q I see.
MR. ROSEN: I have no further questions.
THE COURT: Did you tell any of these witnesses that you had any information from Clarence McFarland or anybody else as to the involvement of these people?
THE WITNESS: No, Your Honor.
THE COURT: You did not, all right.

CROSS EXAMINATION

BY MR. STANFORD:

Q Agent Markowvich, what date did you show these photos to these people?
A That was February 3rd, 1966.
Q Approximately five months—1966?
A Yes, sir.
Q Five months after the occurrence of August 26?
A Yes, sir.
Q The Court has indicated to us that Gregory is a [fol. 27] person convicted in the District of Columbia. Do you know whether Willis and Clemens were also persons who are convicted in the District of Columbia?
A That I could not state.
Q Do you know whether those photographs were FBI photographs or whether they were Metropolitan Police photographs?
A Metropolitan Police Department.
MR. STANFORD: Your Honor, Agent Markowvich's description is his opinion, and his opinion might be good, but I think the Court should consider whether or not these photographs are similar or dissimilar. I think they are something which are a part and are available.
THE COURT: Now, did we get the correct name, the names I got—
MR. STANFORD: Clifton Gregory.
THE COURT: Robert Lee Willis, Theodore Clemens?
THE WITNESS: Yes, Your Honor.
THE COURT: And these two defendants?
THE WITNESS: Yes, sir. I have the Metropolitan Police Department number.

MR. STEPENUK: I might say, Your Honor, excuse me for interrupting, but I have already tried the Metro-[fol. 28] politan Police Department to Sergeant Whelan Fallin, I believe it is. I asked him to get these photographs, and he said they did not have them. He looked for them this morning and they are not in the file, and according to Sergeant Fallin, they are not available. I would be happy to have him check again. After this matter came up this morning, Your Honor, I did try to get that information. These photographs are not there, according to Sergeant Fallin.

MR. STANFORD: May I address Mr. Stepenuk, Your Honor?

I wanted to ask him whether he knew whether these people have been convicted or arrested in any other jurisdiction.

MR. STEPENUK: I do not know.

MR. STANFORD: It is a possibility that those photographs may be available in Maryland or Virginia or some other jurisdiction.

THE COURT: Possibly. I think Gregory is incarcerated for some time. He was first tried by Judge Holtzoff, and the case was reversed, and then he was tried by Judge McGarraghy and the case resulted in a mistrial, and then he was tried in this Court the third time, and it is now on appeal.

I don't recall offhand the date of the offense, but it was a considerable time ago. I think he has been incarcerated since he was apprehended.

[fol. 29] I am going to ask my law clerk to see what he can do about making these pictures available to counsel.

Do you have the names? The first name is Clifton Gregory, the next one is Robert Lee Willis, the third name is Theodore Clemens, and these two defendants are John L. Bailey and Charles J. Ash, Jr.

Now, Mr. Markowvich has the numbers which may be of some assistance. I ask you to give him those numbers.

MR. ROSEN: Your Honor, on this point, I should have asked, and I mentioned it to Mr. Stanford, and

possibly the Court would entertain the dates of the various photographs. In other words, was it a recent photograph or Ash or Bailey or any of these other people that were shown to these witnesses.

THE COURT: I think the photograph usually indicates the date on which it was taken.

MR. ROSEN: That is correct.

MR. STANFORD: May I ask if Agent Markowvich knows or the U. S. Attorney whether there was some indication in the other record, another police record, of the facts of the taking of the photographs?

MR. STEPENUK: I do not know.

MR. STANFORD: If it is not on the photograph itself it might be some other—on some other record?

[fol. 30] THE WITNESS: I believe, as Your Honor has stated, all of the photographs at the Metropolitan Police Department have the date the photograph was taken.

THE COURT: What may well have happened is that since we have been using photographs rather more widely than formerly for this means of identification, photographs may have been taken out to some other case and misplaced. That sometimes happens.

MR. ROSEN: Although I would say this, Your Honor, Simmons, as the Court notes, has been a recent phenomena, and Wade and Stovall came down last May or last June, so I don't know.

THE COURT: Identification by photographs is nothing new.

MR. ROSEN: No. My point is this, I don't think there is much stress on the in-court hearing to suppress photographs.

THE COURT: If we can locate the photographs, they will be located.

MR. STANFORD: Your Honor, if I may, I have just two or three more questions that I may ask Agent Markowvich.

[fol. 31] BY MR. STANFORD:

Q When you asked these people these questions, were they together themselves or did you ask the question when showing the photographs to them separately?

A They observed the photographs separately.
Q Were you by yourself at the time?
A No, sir, I had another agent with me.
Q And on each occasion, was it the same agent?
A Yes, sir.
Q And who was that?
A Bernard E. Buscher.
Q Buscher?
A Yes, sir.
Q Is he the agent here today?
A No, sir.
Q Is he assigned to the Washington area?
A Yes, sir.
Q Now, you said there were five photographs altogether, one of Charles Ash and one of John Bailey?
A Yes, sir.
Q At that time, do you know whether the other three met either or both of the descriptions which were given [fol. 82] on the police lookout following the robbery in August, 1965?

Did the other three meet the description of negro males, 19 years, 6 feet, 125 pounds, thin build, or the description, negro male, 35 to 45, 6 feet, 155 to 160 pounds, medium brown skin, sharp features, big nose and sharp chin? Do you know whether of those three whether the description met?

MR. STEPENUK: Your Honor, may I just interpose it? I believe a more pertinent question would be whether or not those pictures in fact resembled Messrs. Bailey and Ash without getting into a lot of hearsay, and garbled information in your memorandum.

THE COURT: I think that is probably correct.

You can rephrase your question if you wish.

MR. STANFORD: All right, let me rephrase that, Your Honor.

BY MR. STANFORD:

Q Do you know whether of the three, any of the three were 35 to 45 years of age other than John Bailey?
A I can't recall at this time. I believe they were, but I cannot say positively.

Q Do you know whether any of the three were 19, around 19 years of age?

[fol. 33] A Again, I can't recall positively.

MR. STANFORD: Your Honor, just for the purpose of keeping the record clear, I ask that Mr. Rosen has suggested that be marked for identification.

MR. ROSEN: This is also the P.D. 251.

THE COURT: All right.

MR. ROSEN: For Ash and Bailey, Defendant's Exhibit for identification. This is called the offense report.

THE COURT: Have you seen that?

MR. STEPENUK: No, Your Honor.

MR. STANFORD: This is actually page 2 of that that we are making reference to of the entire three page document.

MR. STEPENUK: Yes. Again, Your Honor, I don't really see the purpose of this, and we have a report based essentially upon hearsay evidence. As I understood, the issue in this proceeding is whether or not there was any unfairness on the part of the Government Agent in exhibiting photographs to certain Government witnesses, whether there was any over-reaching, whether there was any unnecessary suggestion, things of that nature. I really—unless I am missing the point, I don't understand the relevance for what you are doing here.

MR. STANFORD: If Agent Markowvich, Your [fol. 34] Honor, is aware of the description which the people have given of the two men who were at the bank, and then he or someone else inadvertently or otherwise picked two—three photographs which were obviously fat faced people, fifty or fifteen.

THE COURT: Yes, I think that is the answer.

THE DEPUTY CLERK: Joint Defendant's Exhibit No. 1 marked for identification.

(Joint Defendant's Exhibit No. 1 was marked for identification.)

MR. STEPENUK: Your Honor, may I just sit while I am addressing the Court?

Agent Markowvich actually had pictures of Messrs. Ash and Bailey, and he knew what they looked like, so

the question, did he take three other photos knowing what they looked like, and having actual pictures in his hand, did he take three other photos in an effort of perhaps misleading the witnesses. Agent Markowvich didn't need any description of these gentlemen, he had their pictures.

MR. ROSEN: That is the issue before the Court.

MR. STANFORD: That is a leading question in photographic form.

THE COURT: I will let you continue. Let's come to the point.

[fol. 35] MR. STANFORD: I will try to make it very quickly, Your Honor.

BY MR. STANFORD:

Q Now, with respect to the description given by, was it, Miss Apple of pointing out by Miss Apple of John Bailey at the General Sessions Court, this occurred on what date?

A That was February 18, 1966.

Q It was recently, subsequent to the date of February 3, when she had seen the photographs of John Bailey?

A Yes, sir.

Q Did she again see that photograph on the day that you went to Court?

A No, sir.

Q She did not see the photograph between February 3, when she did make an identification and the day that she supposedly identified Bailey in General Sessions Court?

A Not to my knowledge.

Q How close were you to John Bailey at the time, or how close was she at the time that she saw Bailey?

A As I recall, she walked around in the corridor and there was, I believe, a minimum of fifty persons there and she walked closely to him, came back to where I was standing.

[fol. 36] Q What did you say prior to the time?

A I asked if she would walk through the corridor and see if she recognized any person or persons that she had seen in the bank, running through the bank.

Q Did you point in any direction?

A No, sir.

Q How close were you to Bailey at the time that you requested her, I presume, who was standing beside you, how close were you to Bailey at the time you first said, do you recognize anybody in this corridor?

A Oh, I recall maybe thirty, forty feet.

Q And Mr. Rosen had asked you as to the positiveness of the identification by Mrs. Paugh and Mrs. Major and Mr. Taylor. What—how would you rate the identification by Mrs. Apple of the photograph that she was shown of a photograph of that day? Was it a vague identification? Was it, say, I think it looks like him, one of the men?

A She said they could be the two men she had seen there.

Q What was her statement in Court with regard to that after seeing the man Bailey in Court, what was her statement? Was it altered in any way, or did she still say—

A No. At that time she stated she was positive in her identification.

[fol. 37] Q Did she say it looked like the photograph?

A I don't recall.

Q Did she mention the photograph at all?

A Not to my recollection.

Q Did she ask to see the photograph again?

A No, sir, not as I recall.

MR. STANFORD: I don't believe I have anything more at this time.

MR. ROSEN: I have nothing further.

THE COURT: I have one or two questions.

At the time Miss Apple identified Defendant Bailey at the Court of General Sessions on the 18th of February, 1966, and he was standing approximately thirty or forty feet from you, in what status was he at that time?

THE WITNESS: He was talking to a group of people.

THE COURT: Was he handcuffed?

THE WITNESS: No, sir.

THE COURT: Was there anything indicating he wa in custody?

THE WITNESS: No, Your Honor.

THE COURT: Do you know who the other peopl were that he was talking to?

[fol. 38] THE WITNESS: No, Your Honor, I don't

THE COURT: Were these policemen or the jailer o anybody that you recognized in that category?

THE WITNESS: Not to my knowledge.

THE COURT: I see.

MR. STANFORD: If I may, I have an additiona question after conferring with Mr. Bailey.

THE COURT: Surely.

BY MR. STANFORD:

Q Was there any other FBI Agent or police officer whom you now or at the time or have learned subsequently was working on this case in the corridor?

A Yes, sir.

Q Who was that officer?

A Sergeant Fallin and Sergeant Lynn.

Q Sergeant Lynn?

A Sergeant Lynn.

Q Were there anywhere near Bailey at the time?

A No, sir.

Q Do you know whether they had conferred with Miss Apple prior to going over to the courthouse?

A Yes, sir.

[fol. 39] Q Did you ride over together in the car?

A I cannot recall who took Miss Apple over.

Q Do you know if they had any conversation with her preparatory to this viewing which was out of your hearing?

A They could have. I do not know, sir.

MR. STANFORD: I have nothing further.

THE COURT: All right. Anything else, gentlemen?

MR. ROSEN: Would you indulge us a moment?

THE COURT: Surely.

MR. STANFORD: Your Honor, this may be repetitious, but I don't believe so.

BY MR. STANFORD:

Q Agent Markowvich, what was Miss Apple told as to the purpose of her coming down to General Sessions Court?

A To see if she could recognize any person or persons that she had seen running from the bank on, I believe it was, August 26.

MR. STANFORD: I see.

THE COURT: Anything else, gentlemen?

MR. SEPENUK: No, Your Honor.

MR. ROSEN: Not at this time.

MR. STANFORD: None.

[fol. 40] THE COURT: You may be excused, sir. We will need you later. Don't leave us.

THE WITNESS: Yes, sir.

THE COURT: Anything else, gentlemen?

MR. SEPENUK: Your Honor, I should mention that I believe this does satisfy Your Honor's suggestion earlier about an out-of-court identification prior to the testimony on an in-court identification. During the last day or so, these witnesses have been reinterviewed and have been shown photographs, five photographs, not five different photographs, the ones they have previously heard testimony on with similar results. I believe in every case, I don't think under Your Honor's suggestion that testimony would be necessary, but we will be perfectly happy to put it on. I think there has been adequate out-of-court identification prior to in-court testimony, but if Your Honor feels you want additional testimony on this point, we will be happy to put Agent Hugh Berry on from the Federal Bureau of Investigations who will testify to the results of what these witnesses said with respect to five more photographs, as recently as yesterday and today.

THE COURT: I think we will receive that testimony and also had you planned to put on the two Metropolitan Police, Sergeant Fallin and Lynn?

[fol. 41] MR. SEPENUK: No, Your Honor. Sergeant Lynn's wife was hurt in an automobile accident yesterday. I haven't seen him. Maybe he will come here.

THE COURT: Maybe Sergeant Fallin would be able to state whether they made any suggestion to the wit-

nesses. Agent Markowvich did not know what the purported conversation was. I think if he is available, we should ask him the question so it will be in the record. I will be glad to send for him if he—if he isn't here in connection with this case.

MR. SEPENUK: He is not here. I will be happy to get him over here.

THE COURT: Mr. Clerk, do you have any information about these photographs from Police Headquarters?

THE CLERK: Your Honor, I spoke with a man in the identification bureau, and he indicated to me he hadn't checked yet, but he saw no reason why they shouldn't have the photographs on file. He intended to get those photographs and send them by a motor man.

MR. SEPENUK: I might say, Your Honor, Sergeant Fallin is now with the Capitol Police. He may very well still have this file. He brought it over earlier today, and if it wouldn't be to much of an imposition—

[fol. 42] THE COURT: What is Sergeant Fallin's first name?

MR. SEPENUK: Whelan, I believe.

THE COURT: Whelan?

MR. SEPENUK: Whelan, W-H-E-L-A-N Fallin.

THE COURT: He is with the Capitol Police?

MR. SEPENUK: Yes, sir.

THE COURT: Mr. Clerk, would you call the Capitol Police and see if you can get Sergeant Fallin with the file.

Suppose you put on the other Agent?

MR. SEPENUK: Yes, Agent Berry.

Whereupon,

HIGH GORDON BERRY

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q State your name?

A Hugh Gordon Berry.

Q And you are an agent for the Federal Bureau of Investigation?

A That is correct.

Q Your office is here in Washington?

[fol. 43] A That is correct.

Q On May 7th, 1968, did you accompany me to the American Securities & Trust Company at the East Capitol Street Branch for the purpose of interviewing certain witnesses?

A Yes, sir, I did.

Q And did we interyiew certain witnesses at that bank, specifically Mrs. Jean Major and Mrs. Ruby Paugh?

A That is correct.

Q And were certain photographs shown to these two ladies?

A That is correct.

Q I would like you to look at these photographs, and I suppose I should have them marked.

MR. ROSEN: I would suggest that, Your Honor.

THE COURT: Yes, they may be marked.

MR. SEPENUK: Would you like to see them first—By the way, there are two photographs here are the same actually—I see they are different.

THE DEPUTY CLERK: Government's Exhibit No. 1 through 5 marked for identification.

(Government's Exhibits Nos. 1 through 5 were marked for identification.)

[fol. 44] BY MR. SEPENUK:

Q Would you examine those photographs, please, Agent Berry?

A I have.

Q And were those the photographs that were shown to these ladies, Mrs. Paugh and Mrs. Major?

A Yes, sir, they were.

Q And did you inform those ladies of the purpose of their viewing these photographs?

A They were asked whether they could identify anyone.

Q Now, with what results—first as to Mrs. Paugh, by the way, was she interviewed in the presence of Mrs. Major or out of the presence of Mrs. Major?

A They were interviewed independently.
Q Mrs. Paugh, what did she say?
A Mrs. Paugh selected a picture of Charles Ash.
Q Does that picture have a number on it?
A Yes, sir, it does.
Q What is it?
A Government's Exhibit No. 5.
Q Did you make any comments or suggestions to Mrs. Paugh concerning Mr. Ash?
[fol. 45] A I did not.
Q At that time?
A I did not.
Q Did you state anything to Mrs. Paugh concerning the nature of any evidence the Government might or might not have against Mr. Ash?
A No, I did not.
Q Would you tell us what happened in the case of Mrs. Major?
A Mrs. Major also selected a picture of Charles Ash.
Q Government's Exhibit No. 5?
A Government's Exhibit No. 5.
Q Did you make any suggestion to Mrs. Major concerning that picture of Mr. Ash?
A No, I did not.
Q Did you tell her about any evidence the Government might or might not have against Mr. Ash?
A I did not.
Q Now, did you also in my presence interview Miss Betty Apple?
A Yes, I did.
Q Was that yesterday?
[fol. 46] A That was yesterday.
Q Did that interview take place at the Savarin Restaurant in Union Station?
A That is correct.
Q Did you exhibit those photographs to Miss Apple?
A Yes, I did.
Q With what result?
A She also selected a picture of Charles Ash.
Q Anything else?

A Yes, she—after seeing them, she then looked over the others and started to pick up one of the other pictures, and she started to say, I think—she says, "No, I do not know."

Q That other picture that you just testified to, does that have an Exhibit No. on the back of it?

A Yes, it does.

Q What is the number?

A That is Government's Exhibit No. 1.

Q Did you make any suggestion to Miss Apple concerning Mr. Ash?

A I did not.

Q Did you make any effect to single him out?

A No, sir.

[fol. 47] Q Did you state anything about the evidence the Government might have against Mr. Ash?

A No.

Q Early this afternoon at my request, Agent Berry, did you also show those photographs to Mr. Joseph Taylor?

A Yes, sir.

Q And was that here in the Courthouse?

A Yes, it was.

Q And what did Joseph Taylor say?

A "I am sorry, I am not certain. I was distracted at the time it was in your presence. I am very sorry, I am not certain."

Q Right. I believe that is all of this witness. Let me just check one thing here.

Well, did you make any suggestions to Mr. Taylor about Mr. Ash or Mr. Bailey?

A No, I did not.

Q Did you state the nature of the Government's evidence against those gentlemen?

A No, I did not.

Q Did you make any effort to single them out?

A I did not.

[fol. 48] MR. SEPENUK: I believe that is all.

THE COURT: All right, sir.

MR. SEPENUK: I might say—excuse me for interrupting, but I would be happy to take the witness stand.

I do remember, I was there. I would be happy to take the witness stand and give my testimony on that subject if you feel it is necessary. I can state it now or I can state it under oath.

THE COURT: Well, suppose we see what else you have.

MR. SEPENUK: Right.

MR. ROSEN: May I see the pictures?

CROSS EXAMINATION

BY MR. ROSEN:

Q Was that Agent Berry, is that correct?

A That is correct.

Q May I see these photos?

A Here you are.

Q Agent Berry, let me ask you this: What was the purpose of showing these photographs to these witnesses yesterday?

A I was accompanying Mr. Sepenuk and he wished to have the witnesses view the photographs.

Q All right. Now, when you went to say—you identified yourself as an FBI Agent, is that so?

[fol. 49] A That is correct.

Q Mr. Sepenuk identified himself as an Assistant United States Attorney?

A That is correct.

Q At the same time you told them that they would be asked to identify people involved in this particular bank robbery, isn't that so?

A No, I don't believe they were told—

Q Didn't you tell them or ask if they could recognize any one of these particular photographs?

A That is correct.

Q Did you mention the fact of the robbery at all that they were witnesses to?

A Yes.

Q In other words, they had in their minds the purpose of viewing these photographs, is that so?

A That is correct.

Q All right. Now, I notice two of the pictures you have police numbers, is that correct, that is Government's Exhibit No. 4 which I believe is Mr. Bailey and Government's Exhibit 5 which is Mr. Ash.

A I would have to examine all of them.

[fol. 50] That is correct.

Q All right. Also on those photographs of Mr. Ash and Mr. Bailey, they are standing, and they are much more vertical photographs than the other three, is that so, they have a height marker or some sort of pole near them?

A That is correct.

Q Now, is there any reason for that to show them the height?

A I am sorry, I don't understand your question.

Q In other words, is there any reason why the photographs of Mr. Ash and Mr. Bailey are much more vertical than the others? You see the whole body of Mr. Ash and the whole body of Mr. Bailey, whereas the other three sets of photographs show only the mug shot or just up to the chest?

A Yes, the reason for that, these were the only colored photographs I had on me at the time. I was not aware we would be doing this when—I was not aware we would need photographs when I went to see Mr. Sepenuk. At the time I happened to have these photographs with me. These were the only colored photographs we had, sir, so you try to be—give them the complete similarity. We selected the colored photographs to show them.

Q Let me ask you this: Were you with Agent Mar-

[fol. 51] kovich on the 18th when he showed the photographs?

A 1965?

Q In 1966.

A No, I was not.

Q Let me ask you this: Were any of these witnesses positive of the identification of Mr. Ash?

A Absolutely positive, no.

Q Now?

A Absolutely positive, no.

Q They were not?

A No.
Q What was the remark of Mrs. Paugh?
THE COURT: How do you spell that?
MR. ROSEN: P-U-G-H.
MR. SEPENUK: Actually, it is P-A-U-G-H.
THE COURT: That would be Paugh.
MR. ROSEN: Mrs. Paugh.
THE WITNESS: She said she thinks this was him.

BY MR. ROSEN:

Q She wasn't certain?
A No, sir.
Q What about Mrs. Major?
[fol. 52] A The same thing.
Q All right. What about Mr. Taylor?
A Mr. Taylor, I do not recall that.
Q What about Mrs. Apple?
A Mrs. Apple also said she believed that was the man.
Q She wasn't sure?
A That is correct.
Q All right. Let me ask you this: At any time, did you and Mr. Sepenuk make any attempt to have the people come down to police headquarters or FBI headquarters were they could look possibly at a whole reel of these photographs and possibly try to pick out the people with a larger selection?
A You mean yesterday or today?
Q Yesterday or at any time before trial?
A As far as—I never did; I don't believe Mr. Sepenuk did.
Q I am asking you, why didn't you?
In other words, I think you are familiar with the identification process of the FBI headquarters?
A Yes.
Q I take it you are familiar with the identification of the Metropolitan Police Department headquarters?
[fol. 53] A That is correct.
Q In other words, did they have either reels or, as I understand it, either reels of photographs that go into a slide projector or shown on the wall or there is a whole selection or whole book of mug shots? I am speaking

first of Mr. Ash and ask the person of one or two of a greater cross section that five?

All right, why wasn't that procedure followed in this case?

A I can only say from my own experience. I have only been assigned to—less than a year.

Q Surely you had ample opportunity to?

A Of course, they were indicted in 1966 and were awaiting trial, and they had been identified.

Q Well, that is true, but the point is, they never seen a greater cross section other than a few photographs, isn't that so?

A That is right.

Q And did you ever at any time ever indicate the name of these people? In other words, when showing these photographs did you ever tell, for example, Mrs. Paugh that the man she picked out was Charles Ash, Jr.?

[fol. 54] A No, I did not.

Q You did not?

A I did not.

Q Did you ever give—did you ever tell Mrs. Major or Mr. Taylor or Mrs. Apple the name of the man they picked out?

A No.

Q Can you tell us the dates these photographs were made?

A Well, the date on this one is Charles Ash, is dated 8/21/65, the one of John Lee Bailey is dated 3/25/62, and these other three, I do not—they do not give when they happened to be made in the past four months.

Q In the past four months.

MR. ROSEN: I have nothing further.

THE WITNESS: There is a date on one, I am sorry, January, 1968, is the date on the film. That is not necessarily the date of the picture.

MR. ROSEN: I have nothing further of this witness.

THE COURT: All right, sir.

CROSS EXAMINATION

BY MR. STANFORD:

Q Agent Berry, I believe you said that Mrs. Betty Apple identified the photograph of Charles Ash?
[fol. 55] A That is correct.

Q And thereafter she said—she picked up Exhibit No. 1, is that correct, and she said, "I think," and then put it down?

A That is right, she started to pick it up. I do believe she fully picked it up and she said, "I believe this is the one." She started to pick up the other one and she said, "No, I am not certain."

Q That is all she said about the five photographs?

A That is correct.

Q So that Exhibit No. 4 which you identified to be John Bailey was not picked up by Mrs. Apple?

A That is correct.

Q In other words, she made no identification of John Bailey of that photograph at the time?

A That is correct.

MR. STANFORD: I have nothing further.

MR. SEPENUK: Just one question.

REDIRECT EXAMINATION

BY MR. SEPENUK:

Q Is it your testimony no effort was made by either you or by myself to tell these witnesses whether or not they made a correct or incorrect identification?
[fol. 56] A That is correct.

THE COURT: Anything else?

MR. ROSEN: Not of this witness.

THE COURT: Thank you, sir, you may step down. May I see those photographs?

MR. ROSEN: Your Honor, just as another note, as I mentioned to Mr. Stanford, I am not so sure in line with the recent showing of photographs that we don't have a Wade problem right now. We are certainly in post-indictment stage, and it is clear after Wade as to

these—the showing of the photographs yesterday by Agent Berry and Mr. Sepenuk. As far as I am concerned, this would be tantamount to a line up.

MR. STANFORD: Your Honor, we don't contend the photographs of these people was—needed representation, but at that stage of the proceeding if there is going to be any suggestion which there certainly would be, or at least that some of these men, two of them were the persons involved. It is a presentation which should be conducted with counsel present, whether the defendants are present or not is unimportant, it is the same as if it were a lineup.

THE COURT: I am not so sure it is. It seems to me that the question is what, if any, limitation the Court [fol. 57] would put on the Government in precluding the Government from bringing in certain evidence. I think I can deal with this problem by simply precluding the Government from bringing evidence in that the witnesses made of this identification yesterday.

Now, we had a somewhat similar problem in a case I tried last week involving a robbery of the National Bank of Washington. I think I mentioned it to you gentlemen in Chambers. There, in order to qualify a witness, who was approximately 75 years old, he was a parking lot guard at the bank, to give an in-court identification. It was agreed that that witness who had not seen the defendant since the time of the robbery might see a number of pictures and see if he could pick out from that group of similar pictures the picture of the defendant. Defense counsel participated in the selection of the pictures, and I rejected about, I think, four of the first six pictures that the Government proposed to show to the witness, because they were older people, darker people and so forth. We finally got together a group of ten pictures which were of approximately the same age, approximately the same complexion, and I think most of them had mustaches, and the defendant had a mustache, so that in that case there was an agreement between counsel that those pictures should be shown to the defendant, and they were shown to the

[fol. 58] witness and they were shown to the witness in the presence of counsel. However, the defense there is it was a question of primary qualification of the witness to give an in-court identification, and the Government did seek to show this evidence by way of buttressing the selection by the witness of the defendant in Court.

Here, I think since this was an ex parte, and since it might go to the question of qualifications of the witness to make an in-court identification, that I might preclude this evidence. I haven't yet made up my mind on it, but I would not on that basis preclude an in-court identification.

MR. ROSEN: I am sorry, I didn't hear your last comment.

THE COURT: I would not preclude an in-court identification just because a picture was shown, a picture was selected from five.

MR. ROSEN: Let me say this to the Court: Your Honor, I had a similar matter before Judge Youngdahl about a month ago, also a Wade problem. I don't know if you saw the opinion he wrote. Possibly he has the jacket. The case was dismissed this morning, United States against Wilson and Davis, which is in 1220-67, which was an interesting point on the Wade problem. [fol. 59] The more I think about it, Your Honor, I think in light of the fact there was an identification yesterday, and I think the Court might agree with me that the identification of photographs would be a person saying that it would be the reproduction of a person, of the image and would be tantamount if they had a lineup yesterday, five people, Mr. Ash, Mr. Bailey, and these other three people.

Now, as far as I am concerned, Your Honor, this purely is a Wade problem as I see it, because this is post-indictment even though Judge Youngdahl denied the persons position that was required in the critical stage in light of everything eminating from Miranda. Your Honor, we have a post-indictment, we have right to counsel clearly attached.

THE COURT: That relates to the individual, not counsel's preparation for the case for trial.

MR. ROSEN: No, I am not talking about that.
THE COURT: I am.
MR. ROSEN: My problem basically is that I have no objection with counsel prepared us. The point is this: —
THE COURT: I have said unless Mr. Sepenuk can show me a reason for my allowing him to bring out this evidence, I will simply exclude this evidence which is somewhat buttressing the inability of the witness to identify the defendant in Court.
[fol. 60] MR. ROSEN: I would go one step further, I think, in all in-court identification at this junction is taken for this reason, they have not seen the two people, any identification, since the date of the offense, other than the showing of the photographs by Agent Markowvich in February of 1966.
Let's assume, for arguments sake, the Court does not find any violation—any Stovall problem, any violation of due process. It wasn't suggested in any way they showed a good, full representation of people of similar height, weight, age or build, and appearance, and they were able to select Messrs. Ash and Bailey.
The only purpose in a different situation, we do have Wade, Stovall, Gilbert, Simmons, Miranda, all on the books, different standards of conduct, police conduct that now apply. These people have not seen the likeness or the image of the participants, Mr. Ash or the alleged participation of Mr. Ash and Mr. Bailey since those photographs. I think your Honor raised the point of this parking lot guard. There is a lot of water over the dam since February of 1966, possibly their recollection might have been weakened, which I think clearly is the purpose for which Mr. Sepenuk showed them the photographs, as you say, to buttress their identification.
[fol. 61] Here we have a situation where the rights to counsel attaches. Now, it would be just improper, and I think you would agree with me—
THE COURT: This right to counsel attaches to any conference that the Government counsel might have with the accused persons.

MR. ROSEN: I don't reach Wade or Stovall, I think it goes to confrontation between the accused and the eye witness.

THE COURT: No, I disagree with you on that.

MR. ROSEN: I think the direct—

THE COURT: Either counsel may talk to the eye witness.

MR. ROSEN: I am not questioning that.

THE COURT: The Government's counsel's preparation for trial doesn't have to include you.

MR. ROSEN: Your Honor, I think you and I are on a different track. Let me make the proffer this way: I have no objection, for example, if Mr. Sepenuk went to any witness, tell me what these men look like. Obviously they are of a certain height and weight and he was wearing certain colors of garments. Then you come out and say, "Is this the man who robbed." She says, [fol. 62] "Well, it looks pretty much like him." I would see no difference in that if he says you come here to the cell block In the U. S. Courthouse and they point out Mr. Ash and Mr. Bailey from the cellblock and say is that the man?

THE COURT: I don't agree with you.

MR. ROSEN: I think the matters are clearly implicit in Wade, Gilbert and Stovall. This is clearly an out-of-court identification. The image is the same as if she saw that person.

THE COURT: Well, Mr. Rosen, you have been very able and built up new law, and you may be building it up out of this case. I don't think that is the case.

MR. ROSEN: I certainly think so.

THE COURT: All right.

MR. ROSEN: Not only that, the other point I was going to make, if Your Honor can recall why I asked the Agents why these different people didn't go down to headquarters to look at a reel of photographs and a mug book, I think clearly in Roosevelt Wright one of the tests—the burden is on the Government to show why there wasn't a fair lineup, and here, as far as I am concerned, showing the photographs is implicitly the [fol. 63] same as a lineup. When you have image, when

you have direct confrontation, I think the burden, and I asked Agent Berry and Agent Markowvich why weren't these people asked to come down to police headquarters. If, for example—

THE COURT: Number 1, Mr. Rosen, before you get off into the wild blue yonder, this is a due process case, Stovall. It isn't Wade and Gilbert.

MR. ROSEN: It isn't Wade and Gilbert, but my contention is that Wade and Gilbert as of the showing of the photographs yesterday.

THE COURT: I disagree with you on that.

MR. ROSEN: That is an excellent argument.

* * * *

[fol. 65] THE COURT: Can you tell us, Mr. Markowvich, who the other defendants are? We have a number of them here. You have some numbers, and perhaps it would assist you if we can get them in the proper order. Which one is Robert Willis?

THE WITNESS: 189696.

THE DEPUTY CLERK: Government's Exhibit No. 7 marked for identification.

(Government's Exhibit No. 8 was marked for identification.)

THE COURT: Theodore Clemens?

THE WITNESS: 188636.

THE DEPUTY CLERK: Government's Exhibit No. 8 marked for identification.

(Government's Exhibit No. 8 was marked for identification.)

THE DEPUTY CLERK: Government's Exhibit No. 9 marked for identification, and Government's Exhibit No. 10 marked for identification.

[fol. 66] (Government's Exhibits Nos. 9 and 10 were marked for identification.)

THE COURT: Which is Number 9?

THE DEPUTY CLERK: Exhibit 9 is Bailey, Your Honor, and No. 10 is Ash.

THE COURT: All right.

FURTHER REDIRECT EXAMINATION

BY MR. SEPENUK:

Q Agent Markowvich, I will hand you Government's Exhibits 6 through 10 for identification which purport to be the photographs of the five individuals which you exhibited on February 3, 1966, to the various Government witnesses. Would you tell us whether in fact those are the photographs?

A I believe the one of Clifton Gregory, No. 201012 is the same.

Q Is that Government's Exhibit No. 6?

A Yes, sir.

THE COURT: You mean the identical one or the one from the same negative?

THE WITNESS: It is off the same negative; it is not the original that I exhibited.

THE COURT: All right.

[fol. 67] THE WITNESS: The one of Mr. Bailey, No. 123909, according to the photograph, I believe, this was taken 2/1/67, which was taken later than the photograph which I exhibited.

THE COURT: All right, sir.

BY MR. SEPENUK:

Q Is that Government's Exhibit No.—

A No. 9.

Q No. 9, is that or is that not similar to the photograph that you exhibited?

A Yes, it has the same number.

Q Would you please continue?

A No. 188636 of Theodore Clemens is the same number, and I believe that one is identical.

Q What Government Exhibit No. is that?

A No. 8. The one of Robert Lee Willis, 189696 is taken 7/28/67, and would be similar to the one I exhibited as it was taken.

THE COURT: It is not the same negative?

THE WITNESS: No, sir. The one of Charles James Ash, No. 156672, is not the photo I exhibited. This was taken 1/5/67.

[fol. 68] BY MR. SEPENUK:

Q Do you have a photograph of Mr. Ash you exhibited?

A I have a reproduction of that photograph.

MR. SEPENUK: May that be marked Government's Exhibit No. 11, please?

THE DEPUTY CLERK: Government's Exhibit No. 11 marked for identification.

(Government's Exhibit No. 11 was marked for identification.)

BY MR. SEPENUK:

Q Can you say whether or not the photograph that you showed of Robert Lee Willis was similar to the photograph of Mr. Willis that is presently before you?

A Yes, sir, it has the same identification number.

MR. SEPENUK: Your Honor, I would move the introduction of Government's Exhibits Nos. 6 through 11.

THE COURT: Have counsel seen the photographs?

MR. ROSEN: No, I haven't, Your Honor.

THE COURT: You take a look at them, gentlemen.

MR. ROSEN: I have no objection to the admission.

MR. STANFORD: I have no objection.

THE COURT: While you are examining the photo-
[fol. 69] graphs, I will take up another matter.

(A short recess.)

MR. SEPENUK: Your Honor, I move the introduction in evidence of Government's Exhibits Nos. 6 through 11.

THE COURT: Have you gentlemen seen them?

MR. STANFORD: No objection.

MR. ROSEN: I have no objection. I want the record to show I don't know what the purpose of introducing these in evidence is other than unless Mr. Sepenuk plans to introduce them ultimately to show prior identification. I think the Court might have a Barnes problem, and I think he has a chance to avoid it.

THE COURT: You are quite right about that. Those are hearing exhibits, Mr. Rosen.

MR. ROSEN: I have no objection.

MR. SEPENUK: They are hearing exhibits.

MR. ROSEN: I also move the other exhibits in evidence.

THE COURT: All the pictures are in.

MR. ROSEN: Plus the two police reports.

THE COURT: All hearing exhibits will be received in evidence.

MR. ROSEN: Thank you.

[fol. 70] THE COURT: Here are the other exhibits.

(Government's Exhibits Nos. 6 through 11 were received in evidence.)

THE COURT: Do you gentlemen have any further questions of Mr. Markowvich?

MR. ROSEN: Just one or two.

FURTHER RECROSS EXAMINATION

BY MR. ROSEN:

Q Agent, do your records reflect what order these were shown? Was it the same order you read to us?

A That I cannot state positively, no, sir.

Q Now, you say this Government's Exhibit No. 11 is a reproduction of the photo of Mr. Ash that was shown?

A That is to the best of my recollection.

Q Is this Government's Exhibit, Mr. Bailey, is that the same picture of Mr. Bailey that was shown?

A To the best of my recollection, yes, sir.

Q Now, just one more question on the photograph, Exhibit No. 11. Was this number put on recently or was that marked in the reproduction process?

A I believe that was on the original negative of that picture.

[fol. 71] MR. ROSEN: I have nothing further.

THE COURT: All right.

MR. STANFORD: I just have one question, Your Honor. After viewing one area of questioning.

FURTHER RECROSS EXAMINATION

BY MR. STANFORD:

Q I want to know, Agent Markowvich, referring to Government's Exhibit No. 7, which is of what person?
A Robert Lee Willis.
Q Do you know Robert Willis' age?
A No, sir, I don't.
Q And this is Government's Exhibit No. 6, is that Gregory, I believe?
A Yes, that is correct.
Q Do you know his age?
A Not off hand.
MR. STANFORD: I have nothing further.
MR. SEPENUK: That is all we have.
THE COURT: All right, sir, I believe you said that Detective Fallin is here.
MR. SEPENUK: Yes, Your Honor.
THE COURT: Thank you, Agent. You may be excused.

(The witness was excused.)

[fol. 72] MR. SEPENUK: Sergeant Fallin.

Whereupon,

WHELAN H. FALLIN

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q Sergeant Fallin, state your full name, please?
A Detective Sergeant Whelan H. Fallin.
Q What is your position?
A I am a detective sergeant assigned to the United States Senate Security.
Q On February 18, 1966, were you connected with the Robbery Squad of the Metropolitan Police Department?

A I was.

Q Were you engaged in the investigation of a robbery at the American Security & Trust Company, East Capitol Street branch?

A I was.

Q On that date, February 18, 1966, were you present in the Court of General Sessions with FBI Agent Markowvich and Sergeant Lynn of the Metropolitan Police Department?

[fol. 73] A I was.

Q Was that for the purpose of perhaps possibly identifying one of the defendants in this case?

A Yes.

Q Who was the lady to make the identification?

A Her name was Mrs. Apple, Mrs. William Apple.

Q Is that Betty Apple?

A Yes.

Q And tell us what Mrs. Apple did at that time in identifying or not identifying the defendant?

A Mrs. Apple was in the corridor of the Court, and it was about 10:00 or 10:30 a.m., and she pointed out to Sergeant Lynn the subject which she said was one of the men that she believed was involved in the bank holdup in which was the subject of an investigation at 9th and East Capitol. The person she identified and pointed out was the subject at the table over there, John Lee Bailey.

Q Tell us where Mr. Bailey was standing at the time the identification was made? Where was Mr. Bailey located?

A Mr. Bailey was located in the corridor with another man and woman.

Q Who else, if anyone, was in that vicinity?

[fol. 74] A I was there and Agent Markowvich from the FBI and Mr. Bailey had, I believe, his brother was with him and another lady, I am not sure, I think it was his wife.

Q Were you and Agent Markowvich standing together?

A Yes.

Q How far from Mr. Bailey and his group?

A Ten to fifteen feet.

Q Was there anybody else in the corridor? What was the condition of the corridor?

A The corridor at that time of the morning, I would say, I would say the whole corridor there had fifty to sixty people in it.

Q Did you make any suggestion to Mrs. Apple that she should identify Mr. Bailey?

A No, no.

Q Did you attempt to single out Mr. Bailey for special treatment?

A No, sir.

Q Did you tell Mrs. Apple the nature of any evidence the Government may or may not have had against Mr. Bailey?

A No, sir.

MR. SEPENUK: I believe that is all, Your Honor.

[fol. 75]

CROSS EXAMINATION

BY MR. STANFORD:

Q Sergeant Fallin, had you know Mrs. Apple at all prior to the meeting here in connection with this case?

A No, sir.

Q Did you see her on the day that this robbery occurred, August 26, 1965?

A Yes, sir.

Q Did you see her subsequent to that but prior to February 18, 1966?

A Yes, sir.

Q And on how many occasions?

A One.

Q And when was that?

A I can't remember the date unless I refer to my notes. It was a few days prior to the date in question.

Q Would you refer to your notes, please?

A January 23, 1966.

Q At that time did you show Mrs. Apple any photographs?

A Yes, sir.

Q And what photographs were shown to her at that time?

A There was a group of photographs consisting of [fol. 76] five. I don't have the photographs with me.

Q Do you know the names of the persons whose photographs were shown?

A I know two of the people involved—I mean two of the people—two of the photographs, I know two of the photographs, and I don't remember the other name.

Q Could you give us the two that you knew?

A The two I know, Charles Ash and John Lee Bailey.

Q If I suggested the name of Willis, Gregory or Clemens, would that refresh your recollection?

A Yes, sir.

Q Can you identify what has been marked as Government's Exhibits Nos. 6, 7, 8, 9, 10 and 11?

A This is one of the subjects.

Q You are referring to Government's Exhibit No. 6?

A Yes. This is a picture of Ash. That is a duplicate of the picture I showed her. This is a picture but it is of Ash, but it is not the picture I showed, not a duplicate.

Q You are referring to Government's Exhibit No. 10?

A Right. This is a duplicate of the picture I showed her of Ash.

Q What Exhibit is that?

[fol. 77] A 11. This is a photograph of John Lee Bailey, this is another photograph I showed her. This is a duplicate of the picture I showed her.

Q That is exhibit number?

A No. 9.

Q And the next?

A The name escapes me.

Q Which one are you referring to when you say the name escapes you?

A Both of them, these are the other two.

Q These are Government's Exhibits Nos. 7 and 8?

A That is right.

Q But were these two photographs—

A No, this one—these were the duplicates of the photographs, these were the two, not the original photographs I showed her.

Q These are not the original photographs, but were they made from the same negative?

A Yes.

Q That is Exhibits Nos. 7 and 8 which were made from the same negative and is of the same person?

A To the best of my knowledge, they are, yes, sir.

[fol. 78] Q Was Detective Lynn with you at the time you showed these photographs to Mrs. Apple on January 23?

A Yes, he was.

Q Do you know whether Mrs. Apple was shown these photographs at any other time?

A Not to my knowledge.

Q Do you know if Sergeant Lynn spoke to Mrs. Apple at any time other than this?

A I don't believe he did, because he and I were assigned to the case, in this case we were working together. We have the same days off. I don't feel he did.

Q Did you subsequently turn these photographs over to Agent Markowvich of the FBI?

A The photographs we showed?

Q Yes.

A No.

Q Do you know whether Agent Markowvich showed these photographs to Mrs. Apple subsequent to your showing her on January 23, but prior to February 18?

A He was present on January 23, when we showed them to her. If he did at any other time, I do not know.

Q Sergeant Markowvich was present with you and Sergeant Lynn at the time you showed the photographs to Mrs. Apple on January 23?

[fol. 79] A That is correct.

Q When you and Sergeant Lynn and Agent Marruary 18, who notified her of the fact you wished her to go down to the Court for identification purposes?

kowvich went to the General Sessions Court on Feb-

A I do not know.

Q Do you recall what you said to her the purpose of your going to General Sessions?

A I say I don't remember. I know I didn't notify her.

Q You didn't initiate the call?

A No.

Q Do you know whether you said anything to her after you first met her that day but prior to seeing Bailey in General Sessions Court?

A I don't remember.

Q Do you recall whether you or anyone in your presence said to her why you knew that Bailey was going to be at this location?

A No, I don't.

Q Did you mention the fact this was a suspect in the bank robbery of August 26, you wished to have her look—I am referring to you or any other person, Ser- [fol. 80] geant Lynn or Agent Markowvich? Did you say that you wished to have her to see whether this was one of the men connected with the bank robbery?

A She had identified the photograph of John Lee Bailey from the file that was displayed to her, and she stated at that time she had routed to see the person, this person in person, and there did come a time when we learned of his going to Court. I don't know who notified her to be there or how come she was there. She said she wanted to see him in person.

Q Were you present—strike that.

When you say that she identified Bailey from the photograph which you showed her, was that on January 23?

A Yes.

Q Do you recall her words in connection with that?

A She stated that she was quite sure this was the person, but she would rather see the person in person before she could make a positive identification.

Q She did not say, "This could be one of the men"?

A I don't remember the exact terminology, but I was led to believe she was—she thought that it was him, but she would not be 100% sure.

Q Did you or Sergeant Lynn or Agent Markowvich tell her that she was going down to see this man whom [fol. 81] she identified in the photograph, that is, did you tell her you were going to show her in person the man whose photograph you had shown her on the 23rd of January?

A No, sir.

Q Did you get anything from—did you gleen anything from what she had said to indicate that she believed that this was the man whose photograph was shown to her on that date?

A I didn't quite get you.

Q Now let me rephrase that.

She said on January 23, or some time subsequently that she wanted to see the man in person whose photograph she was shown on January 23, is that correct?

A She said before she could make a positive identification she wanted to see the person.

Q She wanted to see the person whose photograph she had been shown?

A That is right.

Q And thereafter, do you know whether she was told that she was going to see this man whose photograph she was shown?

A No, she wasn't. I tell you this, as well as I recall, that came as a surprise in the Court, the corridor of the Court. I did not know John Bailey was in the Court-[fol. 82] house. She came up and I heard her walk to Sergeant Lynn and told him she had seen the man, she believed, that was one of the holdup men at the bank. At that time she pointed out John Lee Bailey.

Q You did not know the purpose of your going to Court that day?

A I knew the purpose of my knowing, but I didn't know he was yet in the Courthouse.

Q Do you know whether Sergeant Lynn had seen him prior to Mrs. Apple's seeing Bailey?

A It was my belief he had not. It was a surprise to him.

Q What floor of the General Sessions Court was that?

A The first floor.

Q The first floor?

A Yes.

Q And where was that?

A It was in the hallway or the corridor.

Q I am fairly familiar with that corridor. Could you tell us where in relation to that part, was that the central part, where the central part of the corridor is, where the elevators are?

A No, it was between the elevators and E Street.
[fol. 83] Q It was about halfway between?
A It was in the corridor. I am not sure whether it was the first or second floor. It was in the corridor between the middle of the elevators of the Municipal Court and E Street. It could have been the first or second floor.
Q How long were you on that floor, whether it was the first or second floor, how long were you in the General Sessions Court building, presuming you walked directly to the general area when you learned of her identification?
A I had just gotten there.
Q Would you say it was a matter of ten seconds?
A No, longer, five or ten minutes.
Q Five or ten minutes?
A Yes, sir.
Q Had you been walking around in that area? Had Mrs. Apple been walking around in that area for five or ten minutes before?
A No, I just walked up to her.
Q Maybe I better get the mechanics straight. Did you all go in at the same time?
A I cannot remember; I do not know.
Q Do you know who drove her to General Sessions Court? Did you drive her in a police automobile?
[fol. 84] A No, I didn't.
Q Did you meet her there?
A I met her in the corridor.
Q Do you know whether anybody drove her there?
A I do not know.
Q Where did you tell her you would meet her there?
A I say I don't remember.
Q Did Sergeant Lynn accompany you to General Sessions Court?
A I don't remember that; I don't know.
Q Do you know how long she had been there when this identification was made?
A I do not.
MR. STANFORD: I have nothing further.
MR. ROSEN: May I inquire?
THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. ROSEN:

Q Sir, when you went with the FBI Agent and showed these photographs, I take it you identified yourself as a police officer, is that correct?

A Yes, sir.

[fol. 85] Q All right. At that time your rank was a Sergeant in the Robbery Squad?

A Yes, sir.

Q Now, at any time did you tell these various people what the purpose of your being there was? In other words, did you tell them you were coming to see them to show them some photographs, could they identify certain people?

THE COURT: I think you made your question more specific. Identify the witness to whom you were talking and the time.

BY MR. ROSEN:

Q At the time you were talking to Mrs. Paugh, can you tell us did you at any time tell her that the purpose of your visit with the FBI Agent was to show her photographs of an alleged suspect from the robbery, this particular robbery involving Mr. Ash and Mr. Bailey and ask if she could identify either one of them out of this group?

A Well, we don't operate like that.

Q How do you operate?

A Well, we don't tell people we are showing them suspects in a particular case, we show them pictures, we have pictures we would like them to take a look at and do they think they can make an identification.

[fol. 86] Q At any time did you ask her or did you mention to her the identification was pertaining to this particular robbery of the American Security and Trust Company on August, 1965?

A Well, I didn't say that; I didn't make that statement, sir. I presumed she knew it was pertaining to that robbery.

MR. ROSEN: Nothing further, Your Honor.

THE COURT: I have one question, Sergeant. I just want to be clear about Exhibit No. 8. Was that shown by you to Mrs. Apple?

Do you have the exhibit?

THE WITNESS: Yes, sir.

THE COURT: You notice the date on that, the date on the mug shot?

THE WITNESS: Yes, sir.

THE COURT: 8/15?

THE WITNESS: Yes, Your Honor.

THE COURT: What was the date on that?

THE WITNESS: 8/15/64.

THE COURT: That was one of the pictures you showed her?

THE WITNESS: Yes, Your Honor.

[fol. 87] THE COURT: I see.

THE WITNESS: It was my belief it was.

THE COURT: Now, No. 9, I believe, you said was not the picture that was shown, is that correct?

THE WITNESS: That is right.

THE COURT: No. 10 was not a picture that was shown?

THE WITNESS: That is correct.

THE COURT: It was simply a picture of the same person taken at a different time?

THE WITNESS: Yes, Your Honor.

THE COURT: All right. Now, anything else, gentlemen?

MR. SEPENUK: Nothing further.

MR. STANFORD: No, Your Honor.

THE COURT: Thank you, Sergeant.

Anything else, gentlemen, you want me to consider?

(The witness left the stand.)

MR. ROSEN: May I have the Court's indulgence?

Your Honor, I would like to call one of the witnesses who saw the photographs.

THE COURT: All right.

MR. ROSEN: I call Mrs. Paugh.

[fol. 88] Whereupon,

RUBY HELEN PAUGH

was called as a witness and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROSEN:

Q Ma'am, would you tell us your full name and address, please?

A Ruby Helen Paugh, 5419 Macbeth Street, Hyattsville, Maryland.

Q Where are you employed? Are you employed at this time?

A Yes, sir, American Securities & Trust Company, 9th & East Capitol Street.

Q Where you so employed on the 26th of August, 1965?

A Yes, I was.

Q Did anything unusual take place that day?

A Yes, there was.

Q Did there come a time after this event happened that you had an opportunity to have a confrontation with Agent Markowvich of the FBI and Detective Fallin of the Robbery Squad?

[fol. 89] A Well, I don't know the gentlemen's names.

Q But the two people you have seen here?

A Yes.

Q This took place at the bank around the 18th of February, 1966?

A (No response.)

Q Well, were you shown some photographs at the bank?

A Yes, sir.

Q All right. Did that take place on the 18th of February, 1966?

A I don't remember if that was the date or not.

Q Did it take place in 1966, approximately six months after the robbery?

A Well, that could be. There were several times that we had conferences about the robbery.

Q Now, did you also have a conference yesterday with Mr. Sepenuk, with Agent Berry and were also shown some photographs?

A Yes, sir.

Q Now, going back to the first time you saw Agent Markowvich, you were shown several black and white photographs?

A Yes, sir, as far as I can remember.

[fol. 90] Q Now, at that time—at the time you saw these photographs, you knew who Mr. Fallin and Mr. Markowvich were. You were informed that one was from the FBI and one from the Police Department?

A Yes, sir.

Q You also knew that the purpose of showing you these photos was to see if you could identify anyone who participated in this particular robbery?

A Yes, sir.

Q Isn't that so?

A That is right.

Q Now, at any time did either gentlemen tell you—discuss with you—ask you anything or say anything other than if you could identify anyone?

In other words, did they say, for example, did any of them or either of them tell you, for example, that a possible suspect had been caught?

A No, sir.

Q And did they tell you or did they ask you or did they say anything to you other than ask you whether you could identify anyone?

A That is all they said.

[fol. 91] Q Now, when you saw—can you recall if you can the various photos that you saw, the black and white photos you saw in your mind?

A No, not really.

Q Did they all appear to you to be similar in appearance in the sense of height, weight, build or whether they had a mustache or not, whether they had long hair or short hair, did they all appear to be similar as far as you can recall?

A No.

Q They all appeared different?

A Different.

Q Different in what respect?

A Some were short, some were tall, some were stout, some were thin, just a collection of photos.

Q It looked like a cross section of people we might say, riding a bus, some tall, some short people, some thin people, some stout people?

A Yes.

Q Can you recall if they were all negro males?

A Yes, there were.

Q I want you to think back to yesterday when Mr. Sepenuk and Agent Berry had this confrontation. All right.

[fol. 92] Did that take place at the bank, I take it?

A Yes.

Q Now, at that time, Mr. Sepenuk introduced himself as an Assistant U. S. Attorney, didn't he?

A Yes, sir.

Q And Mr. Berry introduced himself from the FBI?

A Yes, sir.

Q Didn't he?

Now, since this prior confrontation with Mr. Markowvich, you hadn't seen photographs of any people regarding this bank, isn't that so?

A I haven't seen any photographs.

Q For about a year?

A A year, a year and a half.

Q And you hadn't seen any of the suspects or any one accused of this crime in any sort of a lineup, is that so?

A No, sir.

Q So the only impression you have in your mind are the people who were involved in this robbery is what you saw the day of the robbery and any possible photographs you saw thereafter prior to yesterday, isn't that correct?

A That is correct. Other than what I can't remember of what I have seen.

[fol. 93] Q All right. Yesterday you had this confrontation with Mr. Markowvich and Mr. Berry. Now, isn't it a fact—

MR. SEPENUK: Excuse me, Mr. Sepenuk, myself.

MR. ROSEN: Mr. Sepenuk, I am sorry.

MR. SEPENUK: I wouldn't call it a confrontation, but I was there and Mr. Berry was there.

THE COURT: It was a conference.

MR. ROSEN: I am sorry, a conference with Mr. Sepenuk and Mr. Berry?

THE WITNESS: Yes, sir.

BY MR. ROSEN:

Q At the same time you were also shown photographs, isn't that so?

A Yes, sir.

Q Now, did these—isn't it a fact these photographs that you saw yesterday recreated in your mind the impression that you had or created in your mind an appearance of the person you might have seen at the time of the offense?

A No, not really. They were a collection of photos like the first ones, some were short and tall and varying in sizes. I mean, they didn't leave me with an impression on me, really.

[fol. 94] Q In other words, my point is this: The robbery took place in 1965, and you saw some photos, I believe, six months thereafter, and it has been over a year since you saw or had any—either shown in the pictures or seen anyone possibly involved in the robbery, isn't that correct?

A That is right.

Q Yesterday you were shown some photographs?

A That is right.

Q Did these photographs in any way refresh your recollection or recreate in your mind an image of the person or a person that you saw or might have seen at the time of the offense?

A No, sir, they did not.

Q They did not. You say the appearance of the people looked different? In other words, some looked tall, some looked short, some stocky, some stout?

A That is right.

Q All right. Was there anything on the photographs to suggest to you as to anyone who might be involved in the crime?

A No, there wasn't.

Q Did either Mr. Sepenuk or Mr. Berry say anything regarding anyone who might be arrested or apprehended in this case?

[fol. 95] A No, they didn't.

Q Did they in any way mention to you any evidence that they might have against any person involved?

A No, sir.

Q All right.

MR. ROSEN: Would Your Honor indulge me a moment?

THE COURT: Yes, sir.

MR. ROSEN: I have nothing further, Your Honor.

CROSS EXAMINATION

BY MR. STANFORD:

Q Mrs. Paugh, how many photographs did you see, approximately, six months later?

A After the robbery?

Q Yes.

A I don't remember.

Q Would you say—

A I have been shown photographs several times since the robbery.

Q Several times since?

A Yes, but I don't remember.

Q In how many—how many were in the group when you were shown on the several occasions?

[fol. 96] A I don't remember.

Q Would you say more than a hundred, more than ten, less than ten, give us some general idea?

A It was probably less than ten.

Q Were the same photographs shown to you on each of those occasions?

A I don't know.

Q Did you give a descrtpion to the police immediately following this robbery?

A Yes, sir.

Q Did your description to the police indicate that there was a young man about 19 years of age who was about 6 feet tall, negro, male, light-skinned? Was this your description?

A Yes, sir.

Q Did the photos—were the photographs which you have said numbered something less than ten, including specifically persons who were of entirely different appearance?

A Yes, sir.

Q How many persons would you say in the photographs shown to you meet that general description which I have given to you which you have affirmed?

A Well, I can't say. It was—

[fol. 97] Q When you looked through the deck of photographs, you instantly or almost instantly eliminated several of them because they were specifically of a different color or complexion, shade, different shade, different weight?

A That is right.

Q There were several, however, or were there any in which you—was there a group or only one you identified as being one of the persons?

A Which group?

Q After you eliminated these ones which were obviously different, how many photographs were left?

A Which time are you speaking about when I saw these photographs?

Q How many occasions were there?

A I don't remember. As I say, I saw photographs several times, but probably all, I would have picked out one which to me looked as the subject.

Q At each one of the times you seen these photographs, did they contain persons markedly dissimilar which you gave out to the police?

A Yes, sir.

Q When you looked—you have been affirming that?

[fol. 98] MR. STANFORD: Did you get that, Mr. Reporter?

BY MR. STANFORD:

Q After you eliminated those ones markedly different on each of those occasions, then you picked one whom you identified?

A Yes, I probably picked out one.

Q Now, so you say on each of the occasions when you did make an identification, there were a number of photographs which you eliminated immediately because they were different?

A Yes. They weren't all different. I have been shown three or four that were tall. In my opinion, the suspect was tall.

Q You have said there were some that you eliminated because they were quite different from the description which you gave. Could you tell us how many after this elimination was made of the remaining number?

A No, I can't tell how many.

Q Could you tell us whether any of those were tall or not tall, the ones that remained?

A Well, probably all the ones that remained were tall. To my mind, this was the size of the gentlemen.

Q Did you always in each group of photographs that you were shown, did you always come to the conclusion that some were short and some were tall?

[fol. 99] A Yes, sir.

MR. STANFORD: I have no further questions except Mr. Rosen specifically asked me to request the Court and you—I am standing to block the view of the witness to the two defendants and ask that she not look at either of the defendants at this time as she leaves the Courtroom.

THE COURT: I am not going to have her blindfolded. You gentlemen have witnesses to come in and your defendants are entitled to be in here. If you want to have the defendants removed, you may do so.

MR. STANFORD: Your Honor, I think what I intend to do—I think we came to the conclusion after she was here, I think this is the same procedure, but it doesn't specifically affect Mr. Bailey.

THE COURT: All right.

MR. STANFORD: I request that.

THE COURT: Do you gentlemen have any further questions?

MR. ROSEN: Just one last question.

REDIRECT EXAMINATION

BY MR. ROSEN:

Q Mrs. Paugh, of all these photographs that you [fol. 100] looked at, can you recall out of your mind each time you saw them what percentage, so to speak, of the photographs appeared to you to be the tall people as compared to people who are short or fat or stocky or stout?

A No.

Q Can you recall if there were any that appeared—whether there was two tall people?

A I don't know.

MR. ROSEN: Nothing further.

THE COURT: All right.

BY MR. ROSEN:

Q On the day after, were you ever shown any photographs?

A I don't remember, but I think we probably were.

Q Do you remember if you identified anybody?

A I coudn't identify anybody.

Q Were you ever called down to police headquarters or the FBI headquarters to identify photographs?

A Yes, I was.

Q Can you recall when that took place?

A No, I can't.

THE COURT: It is immaterial if she sees them.

[fol. 101] BY MR. ROSEN:

Q Can you recall if you identified anyone on those occasions?

A No.

Q No, you can't identify, or you didn't identify?

A I didn't identify.

MR. ROSEN: I have nothing further, Your Honor.

THE COURT: All right. Thank you, you may be excused.

Did you have anything?

MR. SEPENUJK: No, I didn't. I just want to qualify the last point.

CCROSS EXAMINATION

BY MR. SSEPENUK:

Q Can you reecall whether or not you identified people? The fact that ycou can't recall whether you made any identity on those occasions, what is your answer to that question?

A Well, I knoow that I didn't surely identify anybody as to say it was that person.

Q But on a ccertain occasion, did you make an identification?

A I would saay a general build of the person, that is all I know.

[fol. 102] MR. SSEPENUK: Thank you.

THE COURT: You are referring to the times you went to either thee FBI headquarters or to police headquarters?

THE WITNESSS: Each time I was questioned or shown photographhs, I would have done the same thing as to the general build of the person. Other than that, I couldn't identify them.

THE COURT: All right.

THE WITNESSS: For certain.

THE COURT: Anything further?

MR. SEPENUKK: No, Your Honor.

MR. ROSEN: No, Your Honor.

THE COURT: You man step down. Anything else gentlemen?

(The witness left the stand.)

MR. ROSEN: No, Your Honor.

THE COURT: I think under the Roosevelt Wright decision what we are confronted with here is the due process, the Stovall issue and not Wade or Gilbert, and since the Government must be afforded an opportunity to establish by clear and convincing evidence that an in-court identification is based on observation of the

suspect other than the intervening observation, that burden has been met and the Court should permit the [fol. 103] Government to allow testimony on this subject. What the testimony will amount to, I don't know. We haven't had any testimony on this subject today, but I will not preclude on what I have been advised at the pretrial, I will not preclude the opportunity for this in-court identification. I think the Government has established a basis for an in-court identification by clear and convincing evidence.

* * * *

[fol. 109] MR. ROSEN: I move the Court to review the motion to dismiss for lack of a speedy trial in this case.

THE COURT: All right.

MR. ROSEN: I ask the Court to take it under advisement.

THE COURT: All right. The same for you?

MR. STANFORD: Yes, Your Honor.

* * * *

[fol. 121]

PROCEEDINGS

(Whereupon, the following proceedings were had in open court outside the presence and hearing of the Jury.)

THE COURT: Gentlemen, it is the Court's understanding in the case of Bailey and Ash you wish the two defendants to remain where they are now until the Government's witnesses have been identified to the Jury panel, is that correct?

MR. STANFORD: Yes, I do with regard to Bailey. However, I would ask the Court if I may recall Sergeant Fallin to ask just about three or four questions. I mentioned this to Mr. Sepenuk prior to today's convening.

THE COURT: All right.

MR. STANFORD: Then I would want to ask and which I did not mention to him, to call Mrs. Apple for about four questions. I think it is after rereading these cases, I think it is rather important.

THE COURT: All right.

MR. STANFORD: I would be very brief, Your Honor.

THE COURT: I assume you want the defendants out?

MR. STANFORD: I would like to have them present here.

I would like to call Mrs. Betty Apple.

THE COURT: All right, sir.

[fol. 122] MR. STANFORD: Before they are brought in, I would like to have Mr. Bailey here with regard to Mrs. Apple.

Whereupon,

BETTY McCARDON APPLE

was called as a witness and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANFORD:

Q Give us your name, please?

A Mrs. William Apple.

Q And your own first name?

A Betty McCardon.

Q Mrs. Apple, were you an employee of the American Securities & Trust Company on August 26, 1965?

A No, sir.

Q I see. You were a patron of the bank or your husband was?

A I was sitting outside of the bank.

Q Now, subsequent on that particular day, following the events of that day, were you questioned by police officers concerning a description of some men?

A Yes, sir, I was.

[fol. 123] Q And did you give a description of an older of the two? Did you say one was younger and one was older?

A I said both were about in their 30's.

Q Both in their 30's? What description did you give them?

A Well, I'm not too sure, because it is almost four years ago.

Q Did there come a time when you were shown photographs?

A Yes.

Q And how soon was that after the occurrence?

A Well, about in 1966.

Q Was it about six months later?

A I guess so.

Q It was some time in January or February of 1966?

A Around there.

Q I am not trying to confuse you, but the police officer testified he showed you a photograph on January 23rd, is that in accord with your recollection?

A It may have been.

Q Was this the first time you had seen photographs at all of persons?

A Yes, sir.

[fol. 124] Q What was told to you by the officers at the time, the officer or Agent Markowvich of the FBI at the time these photographs were shown to you? Was anything said about the photographs that were shown to you?

A No.

Q What did you believe them to be?

A Well, I said that I thought that was the two men, I wasn't sure.

Q Now, before they showed you any actual photographs, what did they—what did you believe them to be? In other words, the officer whom you met in August of 1965, was Sergeant Fallin. Do you remember him?

A No, I don't.

Q The tall grey-haired gentleman who is outside today, one of the police officers?

A Yes.

Q When he came to you, you did not know him except in connection with this case, is that correct?

A No, I didn't.

Q When he showed you photographs before you actually viewed the photographs, what did you believe these

—did you believe these to be what? What did you think was his purpose of showing you these photographs?

[fol. 125] A Well—

Q I mean, you didn't—these were not prospects to be put on the tops of baseball cards? You knew it was not in that connection? In what context did you believe these photographs were shown to you?

A (Nodding.)

Q You do not know why?

A No.

Q Now, did you give any description as to the color and complexion? I don't mean as to the color as to race, but the shade of complexion of the men to whom you described to the police?

A I said the fellows were not too dark complected.

Q Were not too dark complected, did you say?

A Yes.

Q I show you what has been marked Government's Exhibit No. 8, do you recall whether this one is a photograph that was shown to you when you first saw the photographs from—shown to you by police officer Fallin?

A I am not positive myself.

Q Would this immediately—by looking at this photograph I am referring to Government's Exhibit No. 8, [fol. 126] would this immediately in your mind be eliminated from consideration as one of the men by virtue of the description which you have given?

A Yes, I believe it may have been.

Q It was immediately eliminated because for what reason, as to shade?

A Yes.

Q Was this too dark to be considered by you as one of the men?

A No, it is not too dark.

Q Was there any other reason why you immediately eliminated this from consideration?

A No.

Q Now, I show you what has been marked and received in evidence as Government's Exhibit No. 7, for this hearing, by virtue of your description of age was this—

MR. SEPENUK: Your Honor, excuse me for interrupting, may I make one comment. I don't object again, but I do think it might be irrelevant. The purpose to show these if there is any overreaching on the part of the officers in showing the photograph. Now, we are going to go essentially to trial here, and I really don't think it is quite pertinent. I won't offer the same objection, but I do feel—

[fol. 127] THE COURT: I think the question is whether the identification was unnecessarily suggestive.

MR. STANFORD: Pardon me, Your Honor.

THE COURT: I think the question whether the officer was unnecessarily suggestive in showing the photographs.

MR. STANFORD: Yes, Your Honor, and as a corollary to that, whether the photographs themselves by virtue of their disparity and marked difference would be in itself suggestive to the witness, so although it is one conduct which has been criticized by the Supreme Court has been the suggestion made by the officer, we have the fact inherent in the presentation of the photos, and there may be such a difference that they would be subject to immediate elimination.

THE COURT: That would be a question for the Court, isn't it?

MR. STANFORD: I think it would. I definitely think it is for the Court. If the witness who saw it immediately eliminated, one who had given a description, all that must be taken into consideration by the Court.

THE COURT: I would sustain the objection.

BY MR. STANFORD:

Q I show you what has been marked Government's Exhibit No. 6, do you know if this is one of the photos, those here?

[fol. 128] MR. SEPENUK: I thought that was precisely the objection that was sustained.

MR. STANFORD: I didn't think the objection went to that point. I was not continuing on that area.

THE COURT: I don't know what No. 6 is. A number of pictures were subject to the interrogation yester-

day. We know what the pictures are. Presumably this witness did make her identification.

MR. STANFORD: Very well, I will not pursue that with Mrs. Apple. I would like to ask her, however, in connection with the latter instance which occurred, I believe the officer said, on February the 18th.

BY MR. STANFORD:

Q Do you recall going to General Sessions Court with Special Agent Markowvich of the FBI, Sergeant Fallin and Sergeant Lynn?

A Yes.

Q You were at that time—who had contacted you to go to that meeting, which one of those three requested you to come there?

A (Nodding.)

Q You don't know or recall at this time?

[fol. 129] A No, I don't.

Q Do you recall where you met them or where they met you?

A (Nodding.)

Q Do you recall what was said to you about the purpose of going to General Sessions Court?

A No.

Q Now, was anything said to you with regard to identity prior to your going down to General Sessions Court?

A No.

Q Well, did you think it was before you got to General Sessions Court, did you think you were going down there in any way in connection with this bank robbery on August 26th?

A No, I didn't.

MR. STANFORD: May I have the Court's indulgence?

THE COURT: Yes, sir.

BY MR. STANFORD:

Q Let me ask you this: How many times have you seen photographs of people you identified subsequent to the initial identification? How many times have you seen photographs of those two men?

A About twice.

[fol. 130] Q And how many times have you come to Court and seen two men who were pointed out to you as the two men you identified?

THE COURT: I think that question should be rephrased. You are assuming facts not yet in evidence.

MR. STANFORD: All right.

BY MR. STANFORD:

Q How many times were you brought to Court and—were you brought to Court?

A No times in Court, no.

Q Have you ever seen the man whom you saw in General Sessions Court at any time subsequent to that occasion, that is, anytime after February 8, 1966?

A No, I don't think so.

MR. STANFORD: I have nothing further, Your Honor.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. ROSEN:

Q Mrs. Apple, I have certain questions for you: After the robbery, did there ever come a time when you were asked, for example, when you were asked to go to the Metropolitan Police Department Headquarters and look at certain photographs?

[fol. 131] A No.

Q You never were?

A No.

Q Were you ever asked to go, for example, to the FBI to go look at photos?

A No, not that I recall.

Q Now, was the incident—was the incident Mr. Stanford spoke to you, the showing of photographs to you, I believe a series of photographs, was that the first time you saw photographs?

MR. SEPENUK: Mr. Stanford is the gentleman who just questioned you.

BY MR. ROSEN:

Q The gentleman that just questioned you, is that the first time you saw any photographs?

A No.

Q Was the first time—when was the first time that you saw photographs, can you recall that?

A No, I can't.

Q Can you tell us under what circumstances you saw these photographs?

A No, I can't.

[fol. 132] Q Did someone come to you at the job where you were working at a job to show you pictures?

A Yes.

Q Can you recall the name of the person?

A No, I can't.

Q Was he here today? Did you see him in the witness room, can you recall?

A No, I can't recall.

Q Can you give us some general description of that person? Can you, for example, recall if he is a member of the Federal Bureau of Investigation or the Metropolitan Police Department?

A (Nodding.)

THE COURT: What is your answer?

THE WITNESS: (Nodding.)

THE COURT: You have to say yes or no.

BY MR. ROSEN:

Q You have to say yes or no so that the reporter can take it down.

A (Nodding.)

THE COURT: You are shaking your head. You mean to relpy "no"?

[fol. 133] THE WITNESS: No.

THE COURT: All right.

BY MR. ROSEN:

Q Can you tell us where these photographs were shown to you, the first time you saw these photographs? Was that at your job?

A I believe it was at my job.
Q And where were you working at the time?
A It is at the Savarin Restaurant.
Q Is that over here at Union Station?
A Union Station.
Q What position do you have there?
A A waitress.
Q At that very first time—are you all right? Do you feel sick, are you extremely nervous?
THE COURT: What is your question?
MR. ROSEN: She seems to be exceptionally tense.
THE COURT: I understand. Go ahead.

BY MR. ROSEN:

Q Now, was there anyone at that time say anything—
MR. ROSEN: Your Honor, may we have a five minute recess. Mr. Stanford suggests possibly we can [fol. 134] request Mrs. Apple to take an aspirin, and then Mr. Stanford can call Detective Fallin back to the stand.
THE COURT: Counsel come to the Bench, please.

AT THE BENCH:

THE COURT: I have noted in these hearings of this character that witnesses who are simply citizens attempting to perform a public duty seem to be the receivant of conduct which brings about this result. It happened before. I am not blaming counsel for the nature of this conduct, I know you have your duty to perform, but it is obvious to the Court this lady has very little recall of the precise details surrounding the identification. I see nothing demonstrated of any overreaching. She is embarrassed because her recollection is not clear on these incidents. I don't think it adds anything to the question before the Court at this time.
MR. ROSEN: My only concern with the witness, Mr. Stanford has a problem with the identification at the Court of General Sessions. What I am concerned about, it is almost more—I think Mr. Sepenuk's conduct in showing the photographs the other day to those witnesses,

and I am merely concerned if in fact the showing of these photographs, taking of the witness as Mrs. Apple, who has a vague recollection, and I am sure if I were [fol. 135] in her position, I would have too, seeing something three years later and having a vague recollection. I want to know if in fact this refreshes her mind, mostly the appearance for identification of the people.

THE COURT: You asked those questions of the prior witness.

MR. ROSEN: Yes, I wanted to ask that of her, and I think this is still my contention. I reread Wade last night, and I think—

THE COURT: Wade is not applicable in this situation.

MR. ROSEN: Well, you and I disagree.

THE COURT: This is a pre-Wade case, and Wade is not retrospective.

MR. ROSEN: I am not saying that. You have a horse of a different color, and once you go after Wade to five people—let me phrase a hyperthetical with the Court, suppose Mr. Sepenuk and these photographs went to the cell block—five people, three stangers and two—Mr. Bailey and Mr. Ash—went down there, then we have a Wade problem even though the event took place.

THE COURT: I disagree. Counsel has a right to prepare his case with witnesses prior to trial. If he did [fol. 136] not, he would be derelict just the same as you would.

MR. ROSEN: I don't know.

THE COURT: That is the only issue about showing photographs or refreshing the witness's recollection or statements or anything, that is his duty.

MR. ROSEN: I don't even question that.

THE COURT: Counsel is entitled to be present at that stage of it.

MR. ROSEN: I think so.

THE COURT: When interviewing witnesses, you are entitled to be present, of course.

MR. ROSEN: No, that is not my point. When he brings those witnesses face to face with the facts when

the accused is not present, that is clearly a Wade problem, post-indictment, if there is ever one.

THE COURT: With the accused, not with the photographs.

MR. ROSEN: It is not the same.

THE COURT: This is different.

MR. ROSEN: I agree with you entirely.

THE COURT: The Court has never ruled that way.

MR. ROSEN: I think they are going to be in the case.

[fol. 137] THE COURT: All right, you may take it up later. I have made my ruling.

This witness may at this time be withdrawn and you may question Sergeant Fallin.

MR. ROSEN: Very well.

IN OPEN COURT:

(The witness was excused.)

MR. STANFORD: Sergeant Fallin.

I would like to have Mr. Bailey.

Sergeant Fallin has ben sworn, Your Honor, from yesterday.

Whereupon,

WHELAN H. FALLIN

was recalled as a witness and, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. STANFORD:

Q Sergeant Fallin, very briefly, I think I mentioned this to you in the hall prior to our convening today.

On the date that you first showed photographs to Mrs. Betty Apple, had you ascertained whether or not Defendant John Lee Bailey was available to be shown personally?

[fol. 138] A Yes.

Q And what did you ascertain?
A I found he was not.
Q He was not?
What factual—actually, what did you find with regard to that?
A The fact he was not in custody and I had no way of knowing where—of his whereabouts.
Q You just ascertained he was not in custody. Did you ascertain where he was or where he worked at that time?
A At that time I am not sure.
Q So you don't know whether he was readily available at the job or at his home, you just know he was not in custody?
A When I say readily available, I have no way of letting the witness see him at his home.
Q You didn't—
A That is what I mean by not readily available.
Q You did not make any inquiry when he was not in custody?
A That is correct.
MR. STANFORD: I have nothing further of Sergeant Fallin.
[fol. 139] MR. ROSEN: I have some questions.

BY MR. STANFORD:

Q How did you learn or when did you learn that John Bailey was going to be at General Sessions Court?
A Through the investigation, I learned through his bondsman.
Q You learned through his bondsman. Do you know approximately when you learned, not as to date, between January 23 and February 18, February 23, being the date you showed the pictures to Mrs. Apple, and February 18, the day that the union occurred in General Sessions, do you know when in there you learned?
A No, I don't know the date.
Q Prior to the—did you or the police department or anyone in an official executive capacity have anything to do with scheduling his appearance at the General Sessions Court on that date?

A I didn't.

Q Do you recall how you learned who his bondsman was?

A No, I don't.

Q Was—Was this because you learned he was on some charge and was to be in Court at some time in the future?

A That is correct.

[fol. 140] Q Do you know whether his bondsman at that time had the address of his home or where he worked?

A I don't know.

Q You don't know. Do you know whether you made any inquiry with regard to that?

A I don't.

Q Do you know who his bondsman was?

A Weinstein.

MR. STANFORD: I have nothing further.

MR. ROSEN: Nothing further, Your Honor.

THE COURT: All right, you may step down.

(The witness was excused.)

THE COURT: What, if any, additional questions do you have of Mrs. Apple?

MR. STANFORD: I have nothing. I did want to reurge the Court with regard to Sergeant Fallin's testimony that there was no inquiry to determine whether or not this man was available. The first showing on January 23 was a showing of five photographs which the Court must take into consideration as to whether or not there is a disparity between the five which was sufficiently marked so that someone would know truly making a choice, but making a very quick elimination, [fol. 141] that is, they were suggestive inherent in themselves, and as the Court did state earlier that is for the Court to determine. I would ask the Court in view of the description given by Mrs. Apple who is the only one whom we have learned identified Bailey, that there is a disparity, and secondly, we have the fact this man—there was no determination by Sergeant Fallin that Bailey was or was not available to be seen. If he could

be seen at Gener ral Sessions Court, he certainly would be seen on the job b or seen emerging from his home. No inquiry was made e with regard to this.

THE COURT: I think that might raise a serious question if Sergea ant Fallin took the witness to Bailey's home, and when a single individual emerged from the single home that could be validly claimed to be in violation of the due process under Stovall.

MR. STANFORD: It could be if that were the circumstances—the circumstances were such as have been pointed. However, at the particular time there was no determination as to whether or not he could be viewed in a true selection. As a matter of fact, he could, he was working on the Eastley House which was a gigantic job, and there were as many people on that house as there were in General Sessions Court on that day.

[fol. 142] THE COURT: Well, all I am concerned about was what was done, not what might have been done. What was done in violation of the due process under Stovall.

MR. STANFORD: Your Honor, I feel there is a doctrine which we have all heard about that was passed, the fruits of the poison of the tree, and I believe by showing this photograph first when the man was available, and this may be what might be called sewing the seed for the poisonn fruit.

THE COURT: I think if we pursue this subject, we will arrive at a conclusion. We have come to a point we have to have the criminal trial, if I understand your position.

MR. ROSEN: I disagree with you.

THE COURT: All right.

MR. STANFORD: One other thing for the record, when I was inquiring of Mrs. Apple and the Court sustained the U. S. Attorney's objection and thereafter I ceased the line of questioning after he again objected, I just want the record to reflect that I did not voluntarily terminate the line of questioning, but in accordance with the Court's ruling. I think I may have said something which could be taken otherwise.

THE COURT: All right, sir.

* * * *

[fol. 158] THE COURT: You may proceed.

MR. SEPENUK: Ruby Paugh.

Whereupon,

RUBY HELEN PAUGH

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q State your name and address, please?

A Mrs. Ruby Paugh, 5419 Macbeth, Hyattsville, Maryland.

Q What is your occupation?

A A bank teller.

Q What bank?

A American Securities & Trust Company, East Capitol Street Office.

Q Where is that located?

A 9th and East Capitol Street.

Q And I will direct your attention to August 26th, 1965, were you a teller at the bank at that time?

A Yes, sir.

* * * *

[fol. 158] Mrs. Paugh, tell us what happened at that time?

A At approximately 10:15, this young man came into the bank and up to the center of the lobby waving a gun, telling everybody not to move. The new account-clerk-receptionist-secretary was on the telephone and he went over to her desk which is the first desk on the lay-out there and commanded her to put the receiver down on the telephone. This he did twice.

In a few seconds, apparently a few seconds, there was a figure that came in running through the lobby around into the gate behind the tellers' cages and mine being

the first cage, he came around to my right, and my working drawer with the currency was opened, and with the paper bag he scoped up all he could get quickly and then he went into Mrs. Major's cage which was the next one next to mine. He did the same with her, and he immediately ran back out and he was the first out through the door, and the one with the gun backed up to the door and went out last.

[fol. 159] Q How much money was taken from your cage, from you, Mrs. Paugh?

A $1,981.00.

Q Now, Mrs. Paugh, the man that you first described, the man that waved the gun around and made the statement that you say, I want you to look around the Courtroom, Mrs. Paugh, and tell us whether or not that man is present in the Courtroom? Just look around and tell us if that man is here?

A I cannot be sure if he is here.

Q Can you identify that man who walked in the bank, the man you described?

A Not definitely.

Q Can you make any kind of an identification?

MR. ROSEN: Objection, Your Honor.

THE COURT: Counsel come to the Bench, please.

AT THE BENCH:

MR. ROSEN: Well, as the Court knows, the key issue is identification.

THE COURT: Yes.

MR. ROSEN: Twice he asked if she could make an identification, and she said, "No," and I don't think the Government should lead the witness or try to play games [fol. 160] with her to try to evoke an identification that she stated twice she cannot make. I think it is clear and unequivocal she can't identify anybody. If he wants a description of a person, for example, weight, height, and whatnot, I have no objection. She said twice unequivocally she cannot say when she looked, and I don't think further probing or leading of the witness—

MR. SEPENUK: I believe she said she could not definitely identify the person. I asked her could she make any kind of identification, and that is the question that remains unanswered.

THE COURT: I will permit that.
MR. ROSEN: All right.

IN OPEN COURT:

BY MR. SEPENUK:

Q Mrs. Paugh, the question was, I want you to look around the Courtroom and tell us whether or not you can make any kind of identification of the man who waved the gun around in the bank?
A I can make no definite identification.
Q You stated that.
A Other than the fact there is a young man that is here that looks similar to the one in the lobby.
[fol. 161] Q Would you kindly point out that person?
A This young man right here at the end of the table (indicating).
MR. SEPENUK: Would the record reflect Mr. Paugh pointed to the defendant Ash.
THE COURT: How is he dressed, Mrs. Paugh? How is he clothed? What clothes does he have on this afternoon, how is he dressed now?
THE WITNESS: Right now?
THE COURT: You can look back at him.
THE WITNESS: How is he dressed?
THE COURT: What kind of a shirt, coat?
THE WITNESS: He is wearing a white shirt, a necktie, a sport coat, jacket I suppose.
THE COURT: What color is the coat?
THE WITNESS: The coat is tan, khaki.
THE COURT: Yes, sir, the record will reflect the identification as testified to by the witness.

BY MR. SEPENUK:

Q How long did this process take, Mrs. Paugh? How long did the robbery last, give us your best recollection from the time you first noticed—by the way, I would [fol. 162] like you to do one thing. Would you kindly come down to this diagram and make an "X" at the point where you first noticed the first robber come in, just make an "X" where he was standing when you first noticed him?

A (Indicating.)

Q Thank you.

I am sorry, did you give your best estimate of the time this robbery, from the time you first noticed that person?

A I would say approximately three minutes.

Q During that three minutes, what were you doing?

A I was sitting there petrified.

Q Were you sitting or standing, were you sitting?

A I was sitting.

Q What portion of those three minutes, after you first noticed the gentleman you mentioned, after you first noticed him, what portion of any of those three minutes did you look at him?

A Well, I would say constantly, because I didn't look at the young man on the right who was taking the money.

Q You didn't look, you say, at the young man on the right?

A No, sir.

[fol. 163] Q Is it fair to say you cannot make no identification of who that man might be?

A No, I cannot.

* * * *

[fol. 166] Q As I understand, you say someone came in waving a gun saying that nobody move or a robbery or words to that effect.

Now, at that time, this person, did he have anything over his face?

A No, sir, he had a mask such as a woman's stocking.

[fol. 167] Q Was it over his whole face?

A I don't recall. I think that it came down to beneath his nose, that I am not sure. I think, as I recall, that is where it was.

Q All right. Were there any holes for his eyes so that he could see?

A Yes, I guess there must have been holes for his eyes. I don't remember that.

Q All right. Can you tell us what he was wearing?

A There was one young man who was wearing a sport shirt. I am not sure which one; I don't remember. I think it was the one in the lobby, the one with the gun.

Q Was that the one who came in first?
A Yes, sir.
Q Did this individual who came in first ever point the gun at you personally?
A Well, he pointed it at everybody, he was waving it.
Q Was he waving it over his head?
A No, sir. He was waving it over his head he was waving like that (indicating).
Q Waving like that (indicating)?
A Yes.
[fol. 168] Q Did he have a mask on his face, and you could not identify his face, is that so?
A That is correct.
Q Were there any features that you could identify either on his face or anything you could make out?
A No, sir.
Q Let me ask you, are you prepared to tell us with certainty, with absolute certainty that the man you pointed out is the same one you saw in the bank that day?
A No, sir, I cannot say.
Q You mean you are not sure of that except for that, is that?
A No, sir, I am not sure.
Q Can you tell us any description of the person?
A He was tall, I would say 6—maybe 6 feet—
Q Was there—I am sorry.
A 6 feet, I would say, approximately.
Q Was he stout or stocky?
A He was thin.
Q Was there anything unusual about his appearance, such as build or height or anything that might stand out in your mind that you could remember?
[fol. 169] A No, sir, outside of his excitement, he was very excited and nervous, but nothing in his appearance was unusual that I can recall.

* * * *

[fol. 170]

REDIRECT EXAMINATION

BY MR. SEPENUK:

Q You could not identify the second man. I ask you, can you give us any description whatever of that second man?

A Not too much. I only saw a fleeting instance as he came around to my left and behind me.

Q With that understanding of that limitation, would you kindly give us the description as you remember it?

MR. STANFORD: Your Honor, may we approach the Bench?

THE COURT: Yes, sir.

[fol. 171] AT THE BENCH:

MR. STANFORD: Your Honor, I feel this questioning in this area is objectionable to this extent, prior to trial in your hearing, it was not indicated that this woman would not make any in-court identification. That was my implication. I presume, since there was no foundation put forth by the Government to indicate that she was going to do so, I feel that even a fragmentary identification is violatable of that position.

MR. SEPENUK: Certainly she is not to make an in-court identification, I just want to ask her to give us a description. I would like to create the person under the circumstances. If she is going to give a fragmentary identification for a few feet, we feel that when the testimony, that when Mrs. Apple testifies, we do suspect her to make an identification. We are not asking her to make an in-court identification, we want the woman's recollection. It is a scanty one actually.

THE COURT: What do you expect her to testify?

MR. SEPENUK: If it was a negro male, I believe, approximately the same height or an inch or so, dark complexion. It is right in the Jenks Act statement that she testified to. That is all I know what is in the Jenks Act statement. She might not even remember that, I don't know.

[fol. 172] THE COURT: I will let you ask the question.

IN OPEN COURT:

BY MR. SEPENUK:

Q Mrs. Paugh, just give us your best recollection as to the general appearance of that second man?

A Well, I can't really describe much about him, outside of the fact he was larger in build than the first one. Other than that I don't—there is nothing I can describe about him.

Q Do you recall whether he was a Caucasian or a negro?

A I would say he was negro, for the fleeting instance I saw him, he was negro in the instance that I saw him.

MR. SEPENUK: Thank you. That is all I have.

* * * *

[fol. 173] MR. SEPENUK: Mrs. Jean Major, please.

THE COURT: You may proceed.

Whereupon,

JEAN MAJOR

was called as a witness, and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q State your name and address, please?

A Mrs. Major, I live in Maryland.

Q Your first name is what?

A Jean.

Q Would you give us your precise address, Mrs. Major?

A 4404 Summit Place, Silver Spring, Maryland.

Q What is your occupation?

A Bank teller.

Q Speak up.

A Bank teller.

Q At what bank?
A American Securities & Trust.
Q What branch?
A East Capitol Street branch.
[fol. 174] Q Directing your attention to August 26, 1965, about 10:15 a.m., were you duty in the bank at that time?
A Yes, sir.
Q Could you tell us where you happened to be on that —by the way, we have identified here what is a sketch of the inside of the bank, and you have examined this before at my request, have you?
A Yes, sir.
Q Would you come down to the sketch, please, and just put with an "M" the first letter of your last name where you—where you were at about 10:15 a.m. on the morning of August 26, 1965?
A (Indicating).
Q Would you kindly return to the stand.
Directing your attention to that day, Mrs. Major, at 10:15, August 26, 1965, tell us what happened?
A I was at my cage, we call them, making out a payroll with my back towards the front door. My mind was —my full attention was on the payroll until all of a sudden I heard a loud voice, someone stating, don't move. I turned around to see what was going on. The rest of the conversation I am not too sure. I remember him telling us to put the telephone down.
[fol. 175] Q The bandit said "Don't move."?
A "Don't move."
Q And then what did he do?
A He was waving a gun at us, walking up and down the lobby of the bank.
Q Did you see him doing this?
A Yes.
Q Then what happened?
A A second man came around the back of our cages and took money from two tellers, Mrs. Paugh's and mine.
Q Was money taken from you?
A Yes.
Q How much money?
A $1,848.00.

Q By the second man?
A By the second man.
Q Then what happened?
A He walked out to the third cage, the second man, and that man was lying on the floor, possibly in a faint, we don't know, and the second man, when he noticed this, turned around and walked out from behind the cage, joining the first man, and they both left the bank.
[fol. 176] Q How long did this whole process take, from the first time you first noticed the man until the two robbers left the bank?
A It seemed like a long time, but I wouldn't say more than—I would suppose four, maybe five minutes.
Q By the way, where was the first man standing when you first noticed him? Can you possibly point it out on the diagram?
A When I first noticed him, he was coming around behind us, but I hadn't notice him prior to this time.
Q All right. Why don't you come down here and show us where he was when you first noticed him?
THE COURT: Is this a question as to the first man or the second man?
MR. SEPENUK: I am sorry, Your Honor, the first man, the man with the gun. I should have amended the question.
THE WITNESS: The first man with the gun would have been in this area somewhere when I first noticed him (indicating.)

BY MR. SEPENUK:

Q Is it fair to say it was in the vicinity of that "X"?
A Yes.
Q Is that correct?
[fol. 177] A Yes.
Q Would you kindly go back to the witness stand.
From the time you first noticed that first man, the man with the gun, until the two men left the bank, what portion, if any, of that time did you look at that first man?
A Most all the time.
Q Now, I want you to look around the Courtroom, Mrs. Major, and tell us whether or not that man that you described is or is not in this Courtroom?

A I believe he is.
Q Would you kindly state who it is?
A It is this gentleman, the first one (indicating).
Q Is it the first man to the left here?
A Yes.

MR. SEPENUK: May the record reflect Mrs. Major identified the Defendant Ash?

THE COURT: Yes.

BY MR. SEPENUK:

Q Now, what kind of a look, if at all, did you get at this second man?
A Not much at all.
Q Did you see him for any portion of the time?
[fol. 178] A I just looked at him long enough to see that he didn't have a gun in his hand.
Q Did he have anything in his hand?
A Only a big bag or some sore of a recepticle for the money he had, as far as I can remember.
Q All right. In the look that you had, would you kindly give us your best recollection of what he looked like?
A This would be very difficult, because it was such a slight look, the man was shorter, the second man was shorter than the first, more muscular in his build. I can't give you an estimate as to his weight, his age, because it was such a slight look that I would hesitate to go any further than that.
Q Do you recall whether or not he was a Caucasian or a negro?
A He was a negro, they were both negro.

* * * *

[fol. 179]

CROSS EXAMINATION

BY MR. ROSEN:

Q How long have you been a teller at the bank?
A Fifteen years.
Q Now, you were a teller on that day, that robbery?
A I am sorry.
Q You were working as a teller during the robbery?

A Yes.

Q What time did the robbery take place, if you recall?

A Right now I don't remember the exact time. It was in the morning.

[fol. 180] Q All right. Do you remember the day of the week?

A No.

Q Now, I believe you said when the first man came in, "My back was turned," is that correct?

A My back was turned.

Q All right. You then turned around when you heard someone say words to the effect, "This is a stickup" or "This is a robbery," or words to that effect?

A Something—I said when I heard him say, "Don't move," then I turned—

Q When you heard him say, "Don't move"?

A To that effect.

Q To that effect?

A Yes.

Q Did you turn around?

A I turned to face him.

Q Did you raise your hands?

A No, I was told not to do that, and I didn't.

Q All right. Now, when you turned around, were you facing directly at the person?

A Yes, I was a short distance from him.

Q You were a short distance from him.

[fol. 181] Approximately how far would you say?

A Closer than you.

Q This distance would be accurate?

A That would be closer.

MR. ROSEN: About six feet, Your Honor?

THE COURT: The distance between you and the witness?

MR. ROSEN: Ten feet?

THE COURT: I would say it is more than ten feet, approximately 12 feet.

MR. ROSEN: Twelve feet.

THE COURT: Can we agree on that, gentlemen?

MR. ROSEN: Twelve feet?

MR. SEPENUK: Oh, yes, I would say the distance between you and the witness—

MR. ROSEN: About twelve feet, Your Honor.

BY MR. ROSEN:

Q Now, at that time were you looking at him—looking right at his face?

A Looking right at him, at his whole being.

Q All right. Was there anything unusual about his appearance?

A He had a stocking cap over his face.

[fol. 183] Q Is that a lady's stocking?

A Yes.

Q In other words, over his whole face?

A I believe down to here, right under his nose (indicating).

Q You couldn't see this part, is that correct, above?

A Above that.

Q You couldn't make out his face, is that correct?

A That is correct.

Q Was there anything distinctive about his appearance, his height, his weight, his build?

A Yes, I noticed several things at the time. I noticed that he was a light-skinned negro, I noticed he was about six feet or in that neighborhood, I noticed that he was slender, I noticed he was very neatly dressed. These things we are trained to notice in the event, notice all the little details, and we wrote them down immediately following the robbery.

Q All right. I believe a moment ago you told us in response to the prosecutor's question, you believed the man you pointed out in court, you believed to be the same man, is that correct?

A I believed to be the same man.

[fol. 183] Q All right. Are you prepared to tell us with absolute certainty that is the same man, the man you saw in the bank that day is the same man you pointed out today?

A I cannot say with absolute certainty, no.

Q You have some doubt in your mind?

A I have no doubt in my mind, but I cannot say with absolute certainty.

Q All right. Now, you recall what this man was wearing?

A I believe it to be a light tan or a brown shirt, a light shade of color. I don't remember his trousers except I noticed that he was extremely neat in his appearance.

Q Were you able to see which way he went?

A Not once he left the bank door, no, not once he went out of the lobby.

Q While he was in the bank, did he do anything or act in any way that attracted your attention other than point the gun the way—

A He seemed quite excited. He didn't remain in one spot, he moved, as you see on the diagram, up through the whole area that says "Lobby", and he had a gun and he was constantly clicking until we were—we expected at any minute for the gun to go off.

[fol. 184] Q By "clicking," is that clicking the hammer?

A I am not familiar enough to know, of guns to know what he was clicking but there was a clicking noise that I heard.

Q Let me ask you this: Did he ever point the gun directly at you?

A Oh, yes.

Q Like that (indicating)?

A Yes.

Q All right. Did he point the gun in any other manner?

A Yes, he took his turn around the room with everybody.

Q I see.

MR. ROSEN: I have nothing further, Your Honor.

THE COURT: Mr. Stanford?

MR. STANFORD: I have no questions.

THE COURT: Anything else?

MR. SEPENUK: No, sir.

THE COURT: Thank you, you may step down. May the witness be excused?

MR. ROSEN: No objection.

MR. STANFORD: No objection.

THE COURT: You may be excused or remain in the Courtroom, whichever you wish.

(The witness was excused.)

[fol. 185] MR. SEPENUK: Joseph E. Taylor.

Whereupon,

JOSEPH E. TAYLOR

was called as a witness, and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q Mr. Taylor, state your name and address, please?

A Joseph E. Taylor, 15-9th Street, N. E., Washington, D. C.

Q What is your occupation, sir?

A U. S. Post Office.

Q You are an employee of the United States Post Office?

A Yes.

Q And where do you do your banking?

A American Securities & Trust.

Q Could you speak a little louder.

At what branch of the American Securities & Trust?

A 9th and East Capitol Street, Northeast.

Q On August 26, 1965, were you in the bank at that time?

A Yes, I was.

[fol. 186] Q Directing your attention to about 10:15 a.m. on that day, would you please tell us what happened?

A I was talking to Mr. Burton who is one of the tellers and in the course of our conversation, the door opened, I glanced to my left and saw a man come in and then we resumed our conversation.

Momentarily, thereafter, he, the man, said, "Don't move, this is a holdup." And what transpired after that was rather difficult, you know, to recall.

Q Could you try to recall? Do you have any recollection of what transpired after this?

A The gentleman moved around in the bank and—he left out and appeared to drop a bullet, I heard an object fall on the floor, and I saw him reach down, just out of the corner of my eye.

Q Is this the gentleman who you previously described?

A Yes.

Q After he said—did you say, "Don't move"—you give the testimony, what did he say to the best of your recollection?

A That is all I can recall, he said, "Don't move," and I stood still.

[fol. 187] Q For how long a period of time did you look at this person?

A Just a matter of seconds.

Q By the way, would you please come to this diagram, Mr. Taylor, and at my request, you have looked at this, have you not?

A Yes.

Q Would you mark with a "T", the first letter of your last name, where you were standing when you first noticed this gentleman you described? Perhaps you can do it—

A (Indicating.)

Q While you are there, where was the man standing or where was he when you first noticed him?

A I was standing here, just to my left—right.

Q Would you put a circle, a small circle, for indicating that?

A (Indicating.)

Q Stand back just one second.

Is it fair to say then that you were standing where it was marked "T" and the person you described was standing were it was marked "O" when you first noticed him?

A Yes.

[fol. 188] Q And in terms of inches or feet, how far away were you from him?

A Very close. I guess about maybe from—about that distance (indicating).

Q All right. Would you look around the Courtroom, Mr. Taylor, and tell us whether or not the person you described is present in this Courtroom?

A The first man on the end looks sort of like the man that I saw coming in.

Q Which end, the left end?

A The left.

Q The left.

MR. SEPENUK: May the record reflect Mr. Taylor pointed out the defendant Ash.

THE COURT: Yes.

BY MR. SEPENUK:

Q Was that gentleman that you described—did he have anything with him when you looked at him?

A No.

Q Did you—excuse me?

A Not that I noticed.

Q And was there one man or more than one man involved in this?

[fol. 189] A I only had a glimpse of one.

MR. SEPENUK: I believe that is all, Your Honor.

THE COURT: Mr. Rosen.

MR. ROSEN: May I have the Court's indulgence?

THE COURT: Yes, sir.

MR. STANFORD: I will ask Mr. Taylor one or two questions.

THE COURT: All right, sir.

CROSS EXAMINATION

BY MR. STANFORD:

Q You have indicated that Charles Ash, the defendant at this end, and not John Bailey, is that correct?

A Yes, sir.

MR. STANFORD: I have no other questions.

MR. SEPENUK: That is all I have.

THE COURT: Mr. Rosen?

MR. SEPENUK: Thank you, Mr. Taylor.

THE COURT: Did you have any questions?

MR. SEPENUK: I am sorry, excuse me, I understood there were no further questions.

THE COURT: You may proceed, Mr. Rosen.

MR. ROSEN: Thank you.

[fol. 190]

CROSS EXAMINATION

BY MR. ROSEN:

Q Mr. Taylor, I believe you said you work in the Post Office?

A Yes, sir.

Q How long have you been working in the Post Office?

A About 18 months.

Q Where were you employed the day of the offense?

A St. Matthews C.M.E. Church, Cedar Heights, Maryland.

Q In what capacity?

A Pastor.

Q And you left this job, is that correct, to work in the Post Office?

A Yes, sir.

Q Now, you were a regular depositor at the bank, is that correct?

A I beg your pardon?

Q You are a regular depositor at the bank?

A Yes, sir.

Q Now, I understand in your testimony, I believe you said your back was to the front door when a man came in and said, "Nobody move," or words to that effect?

[fol. 191] A No, I was facing the cage.

Q Were you facing the cage over here, is that correct (indicating)?

A Yes.

Q In other words, your side was to the front door?
A Yes.
Q All right. Were you dealing with Mrs. Major or Mrs. Paugh?
A Mr. Burton.
Q Mr. Burton is another teller?
A Yes.
Q All right. What would you estimate the distance from the front door to the cage where you were?
A Four or five feet, I guess.
Q Four or five feet. At that time you immedaitely turned and faced the door.
A I just looked like this (indicating), and then we resumed our conversation.
Q You didn't—weren't—you were afraid?
A I beg your pardon?
Q Did you feel frightened or afraid for someone?
A He had nothing when I looked. You see, he spoke after he came and stood behind me.
[fol. 192] Q When he came in, did he do anything that attracted your attention?
A No, sir.
Q That you looked at him?
A No, sir.
Q All right. When you turned as you described, as you looked at the man, did you see his full face?
A When was that? You mean when he first came in?
Q First off, when he first came in?
A When he first came in, yes.
Q You were able to make out his full features?
A Not fully. That is the reason I said he looks like —I was not certain.
Q All right. Did he have a mask on?
A Not when I saw him.
Q Did you notice whether he had a mustache or anything like that?
A I believe so.
Q Did he wear glasses?
A No.
Q Do you recall the clothing he was wearing?
A Seemed like a dirty white shirt, that's about it.

[fol. 193] Q Did you notice anything else about him?
A I can't recall anything else.
Q I sorry?
A No, I can't recall anything else.
Q Now, you say he came behind you, is that correct?
A Yes.
Q Then he said, "Nobody move," or "This is a robbery," or words to that effect?
A Yes.
Q At that time you turned around to look at his face?
A No, I didn't.
Q Now, after those words were said, "This is a robbery," or words to that effect, until that man left the bank, at any time did you turn around?
A No.
Q To look at his face?
A No.
Q Do you recall if he had a mask on?
A No.
Q The only identification you have of him, you glanced, as you described, as the man came in?
A Yes.
[fol. 194] Q Can you recall if there was anything that attracted your attention to look in that direction?
A No, other than—I was standing talking and no one else other than one other person was there, and I guess from force of habit or instinct or something.
Q Are you prepared to tell us with absolute certainty the man you pointed out is the same man who was in the bank that morning?
A No, I cannot.
Q You just said that—
A I said it looks like him.
Q You have some reservations?
A I cannot be certain that he is.
MR. ROSEN: Nothing further.
MR. SEPENUK: That is all I have, Your Honor.
THE COURT: Any further questions, gentlemen?
MR. STANFORD: No, Your Honor.
MR. ROSEN: No, Your Honor.
THE COURT: May the witness be excused.

MR. ROSEN: No objection.

THE COURT: You may be excused or you may remain in the Court, whatever you prefer.

(The witness was excused.)

[fol. 195] MR. SEPENUK: Mrs. Betty Apple.

Whereupon,

BETTY APPLE

was called as a witness and, after being first duly sworn, was examined and testified as wollows:

DIRECT EXAMINATION

BY MR. SEPENUK:

Q State your name and address, please.

A Mrs. William Apple, 318-D Street, Northeast.

Q And what is your occupation?

A Cocktail waitress.

Q I am going to call your attention to April 26, 1965, do you recall that being the day of the robbery of the American Securities & Trust—

MR. ROSEN: Objection, Your Honor. I would ask the witness testify and not the prosecutor.

MR. SEPENUK: All right, I will rephrase it.

THE COURT: This is a preliminary question, Mr. Rosen. Your objection is overruled.

MR. STANFORD: Just for the record, I believe he said April, you meant August?

MR. SEPENUK: August. I will rephrase it.

[fol. 196] BY MR. SEPENUK:

Q Mrs. Apple, directing your attention to August 26, 1965, at about 10:15 a.m., will you please tell us what you were doing at that time?

A I was sitting in my husband's car on the side of the East Capitol Branch.

Q All right. At my request, Mrs. Apple, have you examined this diagram? Remember I asked you to look at it?

A Yes.

Q Would you just come up here, please, and put an "X" where you were sitting in that car?

I might say this is East Capitol Street, and this is northeast 9th, just put an "X" where you were sitting in the car. Make it a bit darker, please.

We do have an "X" and I will tell you, put an "A", in other words, the first initial of your last name.

A (Indicating.)

Q Would you go back to the stand, please.

Where were you sitting in the car?

A I was on the right hand side.

Q Where was it—who were you with at that time?

A I was with nobody at the present moment.

[fol. 197] Q All right. Who were you with?

A My husband.

Q Where was he?

A He was inside the bank.

Q Again directing your attention to 10:15 a.m., tell us in your own words what you observed, what happened?

A I was sitting in my husband's car at the present moment, and all of a sudden I see a man run out with a paper bag. I said, it is a bank robbery, and then I saw a second fellow run out behind him.

Q Did you observe anything else?

A Then all of a sudden I see the police drive up.

Q All right. I want you to look around the Courtroom, Mrs. Apple, you described—you told us about two men, and I want you to look around the Courtroom and tell us whether or not either or both of those gentlemen are present in the Courtroom?

A Yes, I believe they are.

Q Will you kindly point them out?

A (Indicating)

Q All right, you pointed—I wonder if we might not perhaps ask the witness to come down, Your Honor. I [fol. 198] don't want to make any suggestions to her.

THE COURT: Yes, she may step down and indicate which one you had in mind.

MR. SEPENUK: Step down Mrs. Apple.

Why don't you just walk over, if you will, and point the gentleman out?

THE WITNESS: (Indicating.)

MR. SEPENUK: All right, is that all right?

THE COURT: What is that witness wearing, what kind of clothes does he have on? What colored coat?

THE WITNESS: It's kind of a cream color coat.

THE COURT: All right.

BY MR. SEPENUK:

Q And the other gentleman, if you recognize him, if you please, just point him out?

A I would say with the dark suit.

Q A dark suit.

THE COURT: Where is he seated? At the table?

THE WITNESS: He is seated at the other end of the table.

THE COURT: All right.

MR. SEPENUK: Thank you very much.

[fol. 199] May the record reflect Mrs. Apple pointed to the defendants, Mr. Ash and Mr. Bailey.

THE COURT: Yes.

MR. SEPENUK: Thank you, Mrs. Apple.

CROSS EXAMINATION

BY MR. STANFORD:

Q Mrs. Apple, did there come a time after this occurence on August 26, 1965, when you were shown photographs by the police department or by Agent Markowvich of the FBI?

A Yes.

Q When was that?

A I can't recall just when it was.

Q Was it in August of 1965 or was it September, can you give us some idea?

A No, I can't quite recall at all.

Q Was it soon after the occurrence?

A Yes, it was.

Q How soon?

A Well, I can't say just how soon, because it has been so long ago.

Q It has been longer ago than that?

A Yes. Then entire —

[fol. 200] Q Your memory has dimmed somewhat as a result of time?

A Yes, it has.

Q Now, may I suggest to you that you were shown photographs some five months or more after this occurrence, is that true?

A Yes.

Q Was it in January of 1966?

A I don't recall when it was.

Q At that time were you shown a photo of a man and you say you could not be sure if this was the man, one of the people at the bank robbery from a group of five?

A That is right.

Q You told that to Agent Markowvich of the FBI?

A Yes, I did.

Q Thereafter, were you shown on another occasion within one week or ten days later the same photo by Agent Markowvich of the FBI?

A Yes, I believe I did.

Q Thereafter, about two weeks later, were you then —have an opportunity to see a person whom you identified as in some way in connection with this bank robbery?

A Yes, I believe I did.

[fol. 201] Q In preparation for this case yesterday or the day before, did you have an opportunity to see a picture, another picture of a man, and did you tell the FBI Agent, two agents, Markowvich and Berry that you could not identify that as being one of the men?

A No, I did not.

Q I see. Did you on this day, I believe it was two days ago, in preparation of this trial, did you pick out from the group of five photographs one photograph which you said was one of the men, but only picked out one photograph?

A That is right.

MR. STANFORD: May I have them?
THE COURT: Counsel come to the Bench, please?

AT THE BENCH:

THE COURT: The colored photographs were marked for the pretrial hearing. Do you wish them to bear a trial number now?
MR. STANFORD: Your Honor—
MR. ROSEN: I think I would appreciate that.
THE COURT: All right.
MR. STANFORD: I think they should. I may not use all of them. I don't know how long the Jury will go—
[fol. 202] I want specifically, Mr. Clerk, the ones of Charles Ash.
You may object to this, but I wish to show this was the man she identified.
THE COURT: While they are being marked and you gentlemen sharpening your wits for further conflict, I am going to excuse the Jury so they may take their mid-afternoon recess.

IN OPEN COURT:

THE COURT: Ladies and gentlemen, we will take a ten minute recess at this point.

(Short recess.)

THE DEPUTY CLERK: Defendant Bailey's Exhibits 1 through 5 marked for identification.

(Defendant Bailey's Exhibits 1 through 5 marked for identification.)

MR. STANFORD: Your Honor, may we approach the Bench with regard to these pictures?
THE COURT: All right.

AT THE BENCH:

MR. STANFORD: I want to pull David Shine and crop part of the photographs with tape especially with regard to Ash, the numbers with regard to the numbers, it won't take too long. I won't object to accomplish-

[fol. 208] ing this by putting an exhibit stamp even though it is blank. It may be sufficient to cover the entire area.

MR. SEPENUK: What exhibits are they?

MR. STANFORD: They are exhibits Nos. 5 and 4.

THE COURT: It is not a bad idea if you can do that. I think they should be obscured.

MR. ROSEN: Otherwise you are going to have a Barnes problem.

THE COURT: You won't have a Barnes problem with these defendants. You fellows have a wide range.

MR. ROSEN: That is true. I say the Barnes problem—

THE COURT: The District Attorney should have a Barnes problem.

MR. ROSEN: We have a scale back, equal back some way.

THE COURT: I think it is perfectly all right the way it has been.

That is perfectly all right. You need not scratch that thing.

MR. STANFORD: That is all right.

MR. SEPENUK: May I see it?

THE COURT: I think it is apparent if you look at it you did it twice, put the same number on that.

[fol. 204] MR. ROSEN: Your Honor, before the Jury comes in, I would like to know why they are being shown to Mrs. Apple.

MR. STANFORD: I make that proffer, Your Honor, I wish to show that she was shown pictures on several occasions prior to her identification of an individual as one of those involved in the robbery, and then in trial preparation, immediately before trial she was shown a picture of a man who purports to be John Bailey and was unable to identify from that picture.

THE COURT: You may show them.

MR. SEPENUK: I might say this, Your Honor, this allows us to bring out she picked out Mr. Bailey.

THE COURT: What is this question about?

MR. SEPENUK: In the corridor of the Court of General Sessions.

THE COURT: I won't let you go into that unless counsel has gone into the question of the adequacy of the identification.

MR. ROSEN: I would have no objection provided it is brought out she did not identify Ash in the Court of General Sessions, just Mr. Bailey.

MR. SEPENUK: May I go into that, Your Honor.

[fol. 205] THE COURT: Yes.

MR. STANFORD: Your Honor, for the record, I object to that.

MR. ROSEN: I won't say anything.

MR. STANFORD: You can't.

THE COURT: I won't let him go into the question, because once you have gone into that, he can ask any question.

I am sure you gentlemen observed Mr. Sepenuk does not wait for time and knows what he is doing. That isn't true of all our young men.

MR. SEPENUK: Thank you. At the risk to have I hope to have this chance, I don't know what Mrs. Apple is going to testify to, but if she is unable to recall the identification of Bailey, I would be entitled to put either Sergeant Fallin or the FBI Agent on to testify to her identification.

THE COURT: Yes. Don't let us prolong it. I think she is not too sure of herself as a witness. She is a nervois woman.

MR. SEPENUK: That is right.

MR. ROSEN: I think she is afraid more than anything which is understandable.

MR. STANFORD: All right.

* * * *

[fol. 208] BY MR. STANFORD:

Q To recapitulate, Mrs. Apple, you told us before we had the break, that you had not—that you saw photos sometime in early 1966, and then after you were shown them by the police officer, you were again—saw photos shown to you by police officers—by lieutenants—by special agent Markowvich of the FBI, then you identified a man thereafter in person, is that correct?

[fol. 209] A Yes.

Q But this all occurred some considerable time after the event of August 26, 1965?

A Yes.

Q Then you indicated to us that in trial preparations, a couple of days ago, in Mr. Sepenuk's office, with the FBI Agents present, you looked at five photographs, five colored photographs as opposed to black and white photographs, and from that group of five, you identified one person as being the person you identified who was involved in the holdup of August 26?

MR. SEPENUK: Your Honor, just to save confusion, that was in the Savarin Restaurant at Union Station, not the United States Attorney's office.

MR. STANFORD: All right.

THE COURT: Fine.

BY MR. STANFORD:

Q This occurred a couple of days ago in the Savarin Restaurant where you are employed?

A Yes, it did.

Q I show you what has been marked Defendant's Exhibit No. 5, Mrs. Apple, is this photograph of the man you identified as being involved in the robbery?

[fol. 210] A Yes, it is.

Q I see.

MR. STANFORD: I would ask that that be admitted into evidence and shown to the Jury at this time, Your Honor.

THE COURT: Counsel come to the Bench, please.

AT THE BENCH:

THE COURT: I don't know the reason you are offering this exhibit during this portion of the case, you are waiving your right to a directed verdict if you do.

MR. ROSEN: That is correct.

MR. STANFORD: I withdraw that, Your Honor.

THE COURT: All right, sir.

IN OPEN COURT:

MR. STANFORD: Your Honor, I will not ask that this be moved into evidence at this time.

THE COURT: All right, sir.

BY MR. STANFORD:

Q I would ask you, Mrs. Apple, if you were shown these others photographs which are marked Defendant's Exhibit No. 4, Defendant's Exhibit No. 3, Defendant's Exhibit No. 2, and 1?

MR. ROSEN: Your Honor, may we approach the Bench?

THE COURT: Yes, sir.,

[fol. 211] AT THE BENCH:

MR. ROSEN: Your Honor, I am going to object to Mr. Standford's procedure. I don't know whether he is sandbagging his client, the person he shows, and he asks to pick out Bailey or them. It is highly irregular for Mr. Stanford to do this, and I am going to object to it.

THE COURT: I don't know what counsel is doing, all I know is that he is following a procedure that was followed in the Savarin Restaurant a couple of days ago.

MR. ROSEN: I have this objection. If he is going to make the proffer to show the pictures of Ash, and it was Bailey, pick out Ash and Bailey, then I have to object. If he does go into it, I am going to object. Now, he has shown four and he asked can you pick out the—

MR. STANFORD: No, I am not going to do that, I am going to ask if she saw the other photographs, four photographs, and I am not going to ask her anything further after that on this line.

THE COURT: All right, I don't seen anything objectionable there.

MR. ROSEN: All right.

IN OPEN COURT:

[fol. 212] BY MR. STANFORD:

Q Mrs. Apple, when Special Agent Markowvich showed you five photographs a couple of days ago at the Savarin Restaurant—

MR. SEPENUK: Excuse me, we are talking about Special Agent Berry, not Special Agent Markowvich.

THE COURT: Thank you.

BY MR. STANFORD:

Q When you were shown five photographs by Special Agent Berry, with the other four photographs in addition to the one you have already identified?

A Yes.

Q Now, Mrs. Apple, on the day this occurred, the day that the bank robbery occurred, you stated you were seated in an automobile, your husband's auttomobile?

A Yes.

Q Where was that in relation to the East Capitol Street Branch of the bank which is 822 East Capitol Street?

A I believe it was parked on the 9th Street side of the street.

Q On the 9th Street side?

A Yes.

Q Let me—I am a little bit confused with that. You were on East Capitol Street?

[fol. 213] A No, we were on 9th Street.

Q You were on 9th Street?

A Yes.

Q Was this around the corner?

A Yes, it was.

Q From what point, is the front entrance visible?

A No, not around the corner.

Q As you were on 9th Street, was your car parked on 9th Street, and you cannot see the front entrance, is that right?

A No, you can't.

Q The first time you saw a man moving around the corner he had a paper bag in his hand?

A Yes.

Q You had—during the time you were seated in your car, you had never seen this man before that, is that correct, while you were seated in the car at that time?

A No, they were parked in front of my husband's restaurant at 723 East Capitol, Southeast.

Q Were you in the car at this time?

A Yes, I was.

Q I see. How long a period of time was this?

A About ten minutes.

[fol. 214] Q I see. Now, you had—you said you saw somebody in a car near your husband's restaurant?

A Yes.

Q What kind of car was that?

A It was a cream colored Pontiac convertible.

Q And was this car parked ahead of you or behind you?

A This car was parked in front of us.

Q How many people were in that car?

A Three.

Q Three people. Was this car out of your sight after you were behind the car at that time?

A Yes, it pulled out when we did.

Q So you saw three men in a 1963 cream colored convertible Pontiac?

A Yes.

Q Then this car left?

A Yes.

Q And thereafter you saw a man while you were parked on 9th Street—where on 9th Street, incidentally, were you parked? How far back from the corner?

A Not very far.

Q While you were parked on 9th Street, you saw a man coming around the corner, is that correct?

[fol. 215] A Yes.

Q Now, Mrs. Apple, did you ever have any knowledge of your own personal observation that the man you saw walking or moving around the corner, I think you said running, had been in the bank?

A No, I didn't know for sure.

Q But you had not seen any man, anyone emerge from the bank and you had not seen anyone go into the bank, so you of your own personal knowledge had no awareness of the fact that this person had been in the bank at all, is that correct?

A That is right.

MR. STANFORD: I believe I have no further questions at this time.

THE COURT: Mr. Rosen?

MR. ROSEN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ROSEN:

Q Mrs. Apple, when did you first learn about the robbery?

A I saw the man running around the corner from the bank and going into the alley way.

Q Now, at that time, you didn't know a robbery took place, is that so?

[fol. 216] A No.

Q Now, when—let me ask you, as I understand your testimony, you were parked approximately over here, is that correct (indicating)?

A That is right.

Q All right. Approximately how far were you, would you say, from the corner of East Capitol Street and 9th Street?

A Not very far, that is all I can say.

Q Would you say twenty or twenty-five feet?

A Yes, around there.

Q Were any cars in front of you?

A No cars in front of us and no cars in back of us.

Q I take it when you said the right side, the passenger side, is that correct?

A Yes.

Q Now, were you facing south, going towards the southeast or were you facing north, going in a north direction of Union Station?

A No, we was coming up from 9th Street.

Q In other words, coming up from Pennsylvania Avenue, is that correct?

A (No response.)

[fol. 217] Q Let me ask you this, which direction does 9th Street run, does it run north or does it run south? In other words, north—

THE COURT: If it runs north, it has to run south, too.

MR. ROSEN: I said north or south.

BY MR. ROSEN:

Q In other words, when you were going—
A We were going towards Pennsylvania Avenue.
Q You were facing south. You say you saw the first man carrying a bag when he came around the corner, is that correct?
A Yes.
Q Also you didn't know there was a robbery?
A At the first moment, I didn't know.
Q All right. You only got a fleeting glipse of that person, isn't that so?
A That is right.
Q You were not able to see his whole face?
A That is right.
Q As he ran past you, did he do anything suspicious?
A No.
Q Approximately how long after the first man did the second man come that way?
[fol. 218] A Oh, less than five minutes.
Q You mean, as I understand your answer, there was approximately five minutes lag between the time the first man came around and the second man, is that correct?
A Yes.
Q Now, also at that time you didn't know there was a robbery, is that correct?
A That is right.
Q Now, as the second man ran up 9th Street, which direction did he go?
A He went through the alley way, too.
Q As he ran past you, you did not see his full face?
A No.
Q Did he have a mask on, did the second man have a stocking mask on?
A No.
Q No mask. Did he carry anything in his hand?
A Not the second man.
Q Did you see any gun exposed?
A No.
Q All right. Did the first man have a stocking mask?
A No.

[fol. 219] Q On either occasion, as these two people ran past you, you did not see their full face?
A Yes.
Q And you only saw at the most was a profile?
A Yes.
Q The right side of their face?
A Yes.
Q All right. Were there any distinguishing marks you might have seen on their face, a scar or a mustache or glasses or anything like that?
A No.
Q Then the identification you made of those two individuals is only the profile, isn't that so?
A That is right.
Q All right. Since that day you have not seen those two individuals, isn't that so?
A Where?
Q Since that day, the robbery, you have not seen those two individuals, isn't that so?
A Yes.
Q All right. This robbery took place in 1965?
A Yes.
[fol. 220] Q And your memory has dimmed since that time?
A Yes, it has.
Q Are you prepared to tell us with absolute certainty the two people who ran past you and you saw their profile are the same two people here?
A I still say so.
Q There is no question in your mind?
A No, there isn't.
Q Now, were there anything about there characteristics that you might recall?
A No, there isn't.
Q There height or weight or anything of that nature?
A Well, their height.
Q Well, tell us about their height?
A They look about the same height, that is what I said.
Q Approximately how tall were they?
A Well, I can't say, that is too long ago to remember.

Q Would you say 5 foot 8?
A I would say around that.
Q Were they stocky, heavy?
A No, not too stocky, no.
Q About 180?
[fol. 221] A How much?
Q About 180 or 170?
A Around there.
Q All right. Did either of them, do you recall, wear glasses?
A No, they didn't wear glasses.
Q Did either of them have a mustache or a Van Dyck?
A I didn't get that close a look.
Q Now let me ask you this: The distance—you estimate the distance that where your car was, where you were sitting in the car, the general area where they ran past you, in other words, was about five feet or more where they ran past you?
A About that, because I was sitting in the car.
Q There was about five feet distance of you, where you were to the path or the tracks they ran by?
A Just about.
Q What was the lighting conditions at that time?
A It was daytime.
Q Bright sun?
A No, it wasn't too bright sun.
Q Now, what kind of car were you sitting in?
A We had a Lincoln Continental.
[fol. 222] Q That has tinted glass, doesn't it?
A Yes, it does.
Q And that sort of reflects the sun, keeps the sun out, doesn't it?
A Yes, it does.
Q And you also had some—distorts a person's appearance that comes towards you, is that so?
A Yes.
Q So you really couldn't see accurately the face that came towards you?
A That is right.
Q Now, as these two people ran past you, did they dilly-dally or stop?

A No, they didn't.

Q Approximately how long would you say it took as they ran past you? In other words, was it a fleeting second, so to speak?

A Yes, it was.

Q Now, after these two people ran in the alley, approximately how long after that did you learn a robbery had taken place?

A The police had already gotten there then and that is when I said to the police, "Please don't link me in."

[fol. 223] Q You identified these two people before. Can you tell us now, which was the first man and which was the second man?

A No, I can't.

Q Was your observation of one man better than the second man? In other words, did you get a better look, would you say in your own mind, of the first man that ran past than the second man who ran past you?

A No.

Q Would the look or the glance, so to speak, be about the same?

A Yes.

MR. ROSEN: May I have the Court's indulgence?

THE COURT: Yes.

MR. ROSEN: Nothing further, Your Honor.

THE COURT: Mr. Sepenuk?

MR. ROSEN: May I have the Court's indulgence?

THE COURT: Yes, sir.

MR. ROSEN: Nothing further, Your Honor.

THE COURT: Mr. Sepenuk?

MR. SEPENUK: I just have a few questions.

THE COURT: All right, you may proceed.

[fol. 224]

REDIRECT EXAMINATION

BY MR. SEPENUK:

Q Mrs. Apple, you mentioned a car was parked in front of a restaurant owned by you and your husband, is that right?

A Yes.

Q Where is the restaurant located?
A 723 East Capitol Street, Southeast.
Q How far is that from the bank?
A One block.
Q Would you describe that car?
A It was a Pontiac convertible.
Q Do you remember what year it was?
A No, I don't.
Q What color was it?
A Kind of a cream color.
Q What do you mean by cream? Was it towards white or yellow?
A Closer to white.
Q Was it a bright car or sort of a dirtyish kind of car?
A It wasn't a bright car.
Q Who was in that car?
A There were two gentlemen, one in the front and one in the back.
[fol. 225] Q When you say at the present moment, what do you mean by he present moment?
A Well, one of them left.
Q When did you first observe that car?
A He was backed up to my husband's car and he got out and left and they moved.
Q Was that prior to the time you observed the two men you testified to, before?
A That is right.
Q And how much prior to that time?
A Well, we was there about ten minutes, and when we got to the bank, he went in and then we found out it was a bank robbery, because he was inside of the bank.
Q But you observed the Pontiac, as I understand it, about ten minutes prior to the time you went over to the bank?
A That is right.
Q Is that correct?
A Because he was still in the bank.
Q I didn't quite understand your testimony about those two men you saw in the car. Who were those two men?

A (Nodding.)

Q Do you know who those two men were?

[fol. 226] A No, I don't.

Q You mentioned on cross examination that you made an identification in person of one of the gentlemen you observed, is that right?

A That is right.

Q Do you recall when that was?

A No, I don't.

Q Do you have any recollection as to when after the robbery, was it three months, eight months, six months?

A No, it has been later than that.

Q Tell us where tht personal identification took place?

A I saw him in the corridor.

Q A corridor?

A Yes.

Q And where was that?

A I don't recall where it was.

Q You don't recall what kind of building it was?

A (Nodding.)

Q Do you recall whether there were any police officers or Federal Bureau of Investigation people present at that time?

A Yes, there was.

MR. STANFORD: Your Honor, may we approach the Bench?

[fol. 227] THE COURT: Yes.

AT THE BENCH:

MR. STANFORD: I am afraid that this line of questioning Mr. Sepenuk is pursuing might bring out the fact that it was in the Courthouse, and the Jury could conclude at this point that he was being subjected to other prosecution. I feel that since we have not yet made a decision whether he will appear on the stand, he may not yet determine any of his record which would be brought out. All the Court did was review that yesterday, and this should not be pursued with regard to the nature of the location.

THE COURT: I think it has already been brought out that there was an in-person identification five months after the incident.

MR. STANFORD: That is correct. I did not identify the location and that is the area which I wanted to object to.

THE COURT: Then I think Mr. Rosen brought out, and this is the reason for counsel pursuing it. Mr. Rosen brought out the fact the witness has not seen these two men since that day, so there is an ambiguity in the testimony. I think counsel is entitled to explore it, but she said in the Courthouse.

MR. STANFORD: She said the corridor.

[fol. 228] MR. SEPENUK: She said the corridor, she didn't remember where, but I hoped—what I hoped to do is put the police officer on to tell exactly what she did do. I think they did bring out on cross examination when she previously did that, it was not in connection with an in-custody identification, it was simply one of a bystander in the hallway.

MR. STANFORD: I think we should keep it as an unidentified location.

THE COURT: All right. But the fact is most of the people who go to the Court of General Sessions are traffic violators. I think everybody knows that.

MR. ROSEN: There are more drunks.

THE COURT: I didn't think there were more drunks than drivers.

MR. STANFORD: Your Honor may well be right, that may well be true. In view of the fact he has been charged with a very serious felony, I would feel they might think he was there on another serious matter.

MR. SEPENUK: I think it can be brought out by the prosecution properly why he was there.

THE COURT: I think he has a right to clarify this matter that you brought out.

[fol. 229] MR. ROSEN: I have answered—

THE COURT: Since that day, she has not seen these two men prior to the day of the robbery.

MR. ROSEN: I have an objection that if Mr. Sepenuk is going to do this. The mere fact that she saw him in the corridor without saying it was in the Courthouse leaves the implication that he was one of the criminals.

MR. SEPENUK: I would like to say, I don't want to anticipate considering the state of mind of this woman. I will anticipate that she will probably not be able to identify Mr. Bailey as the person she picked out. If I have to, I will call Agent Markowvich to establish the fact.

MR. ROSEN: I don't think you should get the Courthouse in. Why don't you establish it with him without her.

MR. SEPENUK: I think he is clearly the person to, if he is able to do so.

THE COURT: I will let him ask the question.

IN OPEN COURT:

BY MR. SEPENUK:

Q Again, Mrs. Apple, going back to that personal identification in the corridor of a building, do you recall whether any police officers or federal agents were present at that time?

[fol. 230] A Yes, there was.

Q Who was present to the best of your recollection? Do you know their names?

A No, I don't.

Q Have you seen any of them today?

A No, I don't think so.

MR. SEPENUK: I think that is all.

By the way, I would like to ask just one other question.

BY MR. SEPENUK:

Q Do you remember the person you identified at that time? Did you identify a person at that time as one or more persons as being one of the gentlemen that robbed that bank?

A Yes, I identified one of the persons.

Q Do you recall which person that was?

A Yes, I think I do.

Q Who was it?

A John Lee Bailey.

MR. SEPENUK: Thank you.

THE COURT: Any further questions?

MR. SEPENUK: I am sorry, may I ask just one or two more questions?

[fol. 231] THE COURT: Yes.

BY MR. SEPENUK:

Q What were the circumstances of that application, do you recall how you figured out Mr. Bailey? Tell us what you did?

A I just walked into the corridor and they told me to look around, and I looked around.

Q And how many people approximately were in the corridor at that time?

A The corridor was full.

Q And what did you do after—what did the officers say to you, the officers said what to you?

A They just told me to look around and see if I could identify a fellow in the room, in the corridor.

MR. ROSEN: Objection. It is clearly hearsay.

MR. SEPENUK: I am not introducing it as to a truth, I am just giving some background.

THE COURT: I think with that limiation, I will overrule the objection.

BY MR. SEPENUK:

Q Was any suggestion made to you by—

MR. ROSEN: Objection.

[fol. 232] MR. STANFORD: Leading.

BY MR. SEPENUK:

Q All right.

MR. SEPENUK: Now, if you are objecting to hearsay—

THE COURT: Counsel come to the bench, please.

AT THE BENCH:

THE COURT: I assume you are seeking to show that there was no suggestion made.

MR. SEPENUK: Exactly, yes.

MR. ROSEN: That was a matter of law decided before trial.

THE COURT: I think we have been into that.
MR. SEPENUK: I will drop it.
MR. ROSEN: That was a matter the witness testified to.
MR. SEPENUK: That is all I have.
THE COURT: All right.

IN OPEN COURT:

THE COURT: You may proceed.

RECROSS EXAMINATION

BY MR. STANFORD:

Q Mrs. Apple, to recapitulate on identification, when you first identified this man in the corridor as you stated to us, were you told at that time or at any time prior that he was John Lee Bailey?
[fol. 233] A No, I wasn't.
Q I see. Did you see his photograph anytime within the week?
A No.
Q Two weeks prior to that?
A No, I didn't.
Q You never seen his photograph before?
A No, I didn't.
MR. STANFORD: Nothing further.

RECROSS EXAMINATION

BY MR. ROSEN:

Q Just one question. Mrs. Apple, at that time, since then, you told us of the incident, you did not see the other person involved, is that so?
A That is right.
MR. ROSEN: Nothing further.
MR. SEPENUK: That is all we have.
THE COURT: All right. May the witness be excused?
MR. ROSEN: No objection.

MR. STANFORD: No objection.

THE COURT: Thank you. You may be finally excused.

(The witness was excused.)

* * * *

[fol. 316] MR. STANFORD: The Government rests at this time?

MR. SEPENUK: Yes.

THE COURT: All right.

MR. ROSEN: At this juncture, while we are here, we make a motion for a direct verdict.

THE COURT: You might as well.

MR. ROSEN: I would make it on the grounds of [fol. 317] lack of complete identity. The first element of the offense is robbery and various robberies with all the various counts are, in fact, concerned—

THE COURT: I think that is an issue for the Jury.

MR. ROSEN: Your Honor, if we say that the issue of identification must be proved by the Government beyond a reasonable doubt, I would submit to the Court that the Government has not yet met that burden on your identification.

THE COURT: As I read Curley & Crawford, the issue whether the Jury could on the evidence presented to find beyond a reasonable doubt. It is an issue for the Jury, then it goes to the Jury. I think this is an issue for the Jury.

MR. ROSEN: All right.

* * * *

[fol. 318] Now, for the record, do you wish to join in for a motion for a direct verdict?

MR. STANFORD: I do for the reasons that I previously urged.

THE COURT: I will look at the Kelley case.

MR. STANFORD: Yes, Your Honor.

THE COURT: As to whether or not the Court will strike the answer of the witness.

MR. STANFORD: I will endeavor to find some additional material.

THE COURT: All right.

(Whereupon, at 5:35 p.m., the above-entitled cause adjourned till Friday, May 10, at 11:00 o'clock a.m.)

* * * *

[fol. 323] MR. ROSEN: While I am here, I renew two matters, I would like to renew also the motion as to Mr. Stanford with respect to a speedy trial. I don't know if the Court has ruled as yet. You said you would take it under advisement.

THE COURT: I think that I had a review of the delays in the case, and I have the facts which have been [fol. 324] mostly attributed to Defendant Ash. So far as his two mental examinations at St. Elizabeths are concerned, and the several motions that he filed for a speedy trial which had the effect of delaying the case, and when those circumstances are taken into consideration, it appears certainly as to him the motion should be denied. With respect to Defendant Bailey, Bailey did not go to St. Elizabeths and he, I think, filed only two motions for a speedy trial.

MR. STANFORD: That is correct.

THE COURT: Frankly, I have a question on that motion so far as he is concerned, and one of the reasons I reserve as to him.

* * * *

[fol. 361]

DIRECT EXAMINATION

BY MR. STANFORD:

Q Agent Markovich, you interviewed a woman by the name of Mrs. Betty Apple, did you not?

[fol. 362] A Yes, sir.

Q On February 3rd, 1968, did you not show her various photographs?

A Yes, sir.

Q At that time, with regard to one photograph which was of John Bailey, Defendant John Bailey, did she say that she could not be sure that this was one of the men, but thought it might be?

A Yes, sir.

Q Were those her terms or could you tell us?

A She said it could be, as I recall.

Q Now, prior to that time were you aware of the fact that a Sergeant from the Metropolitan Police Department had shown her the same photographs?

A Not to my knowledge, no, sir.

Q Have you had any conversation with Sergeant Wheland Fallin who is present today and has been present in the witness room throughout the trial, to learn from him whether or not he had shown a photograph of John Bailey to Mrs. Apple at any time prior to your showing her the photograph on February 3rd?

A No, sir.

Q Agent Markovich, did you accompany Special [fol. 363] Agent Berry of the FBI when he showed photographs to Mrs. Apple early this week?

A No, sir, I did not.

* * * *

[fol. 365] Q Did there come a time thereafter, Agent Markovich, when you and Sergeant Lynn and Sergeant Fallin, both of the Metropolitan Police Department, accompanied Mrs. Apple to a location to look at the Defendant John Bailey?

A Yes, sir.

Q Did you initiate that appointment with Mrs. Apple?

[fol. 366] A I can't say for certain if I did or if it was done by the Robbery Squad.

Q Where did you and the two officers of the Metropolitan Police Department meet with Mrs. Apple?

A I believe we picked her up probably at her residence or at work, I am not certain.

Q Were the three of you together at that time?

A I believe the members of the Robbery Squad went down in their own car, and I had a car.

Q You met the three—the three of you met or the three, two police officers and yourself, and Mrs. Apple met at this location?

A Yes, sir.

Q Do you recall what you said to Mrs. Apple prior to her going to this location or what the officer said to her as to the purpose of her going into this location?

A I told her that we were going down to the location—

Q This was a public building?

A Yes, sir. She was to walk through the corridor and observe the people there and see if she could pick out anyone that she had seen near the American Securities & Trust Company on August 26, 1665.

[fol. 367] Q So this was on what date?

A I believe it was February 18.

Q Therefore, it was subsequent by 15 days to the time when you showed her a picture of John Bailey, the Defendant here?

A Yes, sir.

Q And to which she responded it could be the man?

A That is right.

Q And to reitertae, you do not know whether or she had been shown a picture of John Bailey at any time prior to February 3rd, when you first showed her the photographs of John Bailey or any time subsequent to February 3rd and prior to February 18, when she was in the corridor where John Bailey was present?

A That is correct.

MR. STANFORD: I have nothing further.

THE COURT: Mr. Sepenuk?

MR. SEPENUK: Yes, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. SEPENUK:

Q On February 3rd, when you showed Mrs. Apple the [fol. 368] photographs, Agent Markovich, did Mrs. Apple make any comment as to whether or not she could be more sure of the identification if she saw Mr. Bailey?

A She said she thought she could be more positive if she saw him in person.

Q On February 18, the location you mentioned, how many were in the corridor at that time?

A I have to say a minimum of 50.

Q And who was the person pointed out by Mrs. Apple as the man in the vicinity of the American Securities & Trust Company, East Capitol Street Branch, on August 26, 1965?

A John Lee Bailey.

MR. SEPENUK: Thank you.

THE COURT: Is there anything further, gentlemen?

MR. ROSEN: No, Your Honor.

MR. STANFORD: Nothing.

THE COURT: You may step down.

(The witness was excused.)

MR. ROSEN: May we approach the Bench?

THE COURT: Yes, sir.

AT THE BENCH:

MR. ROSEN: Your Honor, at this juncture, I have [fol. 369] nothing further to put on to verify this note. I would like to reserve the right to put additional testimony on if I think it is necessary. My defendant, I will not put on, and I want it on the record.

THE COURT: All right.

MR. ROSEN: Finally, you may get a chance. I defer to Mr. Stanford.

THE COURT: All right.

MR. STANFORD: I would like to call Sergeant Fallin.

IN OPEN COURT:

MR. STANFORD: Sergeant Fallin, please.

Whereupon,

WHELAND H. FALLIN

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANFORD:

Q Sergeant Fallin, you are Sergeant Wheland Fallin of the Capitol Police Department?

A No, the Metropolitan Police Department, detailed to the Capitol.

Q I see. I think you have previously stated to us you have been assigned to this case, Bailey, John Bailey?

[fol. 370] A Yes, I was.

Q In the course of your investigation, did you have an opportunity to speak with Mrs. Betty Apple?

A Yes, I did.

Q Did you show her photographs, specifically a photograph of Defendant John Bailey, on January 28rd, 1966?

A Yes, I did.

Q Do you know whether this was the first time she had seen it, the photograph of John Bailey?

A To my knowledge, yes.

Q Was she shown any photographs by you or by your partner, Sergeant Lynn, at any time subsequent to that date?

A Not to my knowledge.

Q Are you aware of the fact that Agent Patrick Markovich showed her a photograph of John Bailey on February 3rd?

A No, I am not.

Q Then did you accompany Mrs. Apple to a public building on February 18, with Sergeant Lynn and Agent Markovich?

A To the best of my knowledge, I met them at the building.

Q At that time was John Bailey present?

A No, he was not. To my knowledge, he wasn't, I didn't see him.

[fol. 371] Q You did not see him?

A At that time.

Q Did you subsequently see him?

A Yes, I did.

Q This was subsequent to the time you showed the photograph of John Bailey to Mrs. Apple?

A That is correct.

Q What did you say to Mrs. Apple prior to her coming into the building as to the purpose for her going there?

A On the date, I said nothing to her, I didn't meet her until we were in the building.

Q You didn't say or give the purpose?

A No.

Q Did Sergeant Lynn?

A I don't know.

Q Were you accompanying Sergeant Lynn?

A I don't think so, I think I met them at the building.

Q Did Sergeant Lynn pick Mrs. Apple up from her residence?

A I do not know, I can't remember.

MR. STANFORD: I have nothing further.

Mr. Sepenuk?

[fol. 372]

CROSS EXAMINATION

BY MR. SEPENUK:

Q Sergeant Fallin, did you observe Mrs. Apple make the identification of Mr. Bailey in the corridor of this building?

A Yes, I did.

Q Tell us what she did?

A She pointed out to Sergeant Lynn the subject who I identified as John Lee Bailey as the man. She was—she said that was one of the two subjects that ran from the bank at the 800 block of East Capitol Street on the date in question. She pointed him out, he was the one lighting the cigarette.

Q How many people were in the corridor at that time to the best of your recollection?

A To the best of my recollection, I would approximate it at 50.

MR. SEPENUK: Thank you.

* * * *

[fol. 373] THE COURT: I have one observation, gentlemen, with respect to the testimony of Sergeant Fallin. As I recall, your questioning was to the effect did you on the 23rd of January show a photograph to Bailey to Mrs. Apple. Now, my recollection of the prior testi-

mony out of the presence of the Jury was that on that occasion he showed her several photographs, it was not a single photograph. I don't want to ask questions if I don't have to, so I wish if either of you would clear that point up so they will have the facts, whatever the fact is.

[fol. 374] MR. SEPENUK: I should have clarified it. I will be happy to do so.

MR. ROSEN: All right.

IN OPEN COURT:

BY MR. SEPENUK:

Q Sergeant Fallin, you stated on January 23, 1966, you showed a photograph of John Bailey to Mrs. Apple, is that correct, sir?

A That is correct.

Q Was that the only photograph or were there others?

A There were others.

Q How many others were there?

A Four.

Q Thank you very much.

* * * *

[fol. 410] MR. STANFORD: Our next witness, I would like to call Special Agent Berry of the FBI.

Whereupon,

HUGH GORDON BERRY

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANFORD:

Q Would you give the Court and the Jury your full name?

A Hugh Gordon Berry.

Q What is your occupation?

A Special Agent for the Federal Bureau of Investigations.

Q How long have you been so employed?
A Seventeen years.
Q Mr. Berry, did you have any connection with this case? Did you have occasion to speak with Mrs. William Apple?
A Yes, I did.
Q Also known as Betty Apple?
A Betty Apple.
Q And where was that?
[fol. 411] A That was at the Savarin Restaurant in the Union Station.
Q Did you at that time show her several photographs, photographs in color?
A Yes, I did.
Q Did she identify one of those five photographs as the man who was engaged in the holdup of the American Securities & Trust Company in August 26, 1965?
A Yes, she selected one, she thought he was the one.
Q I see. I show you what has been marked as Defendant's Exhibit No. 5 for identification. Is this the man that she identified as the one person of those five whom she believed was engaged in the robbery?
A That is correct.
Q I show you Defendant's Exhibit No. 4 for identification, did she make any identification of that, that is, Exhibit No. 4 with regard to the connection with this robbery?
A No, she did not.
Q Can you tell us whose photographs that is, Exhibit No. 4, who Mrs. Apple did not identify as one of the persons involved in the robbery?
A This is John Lee Bailey.
[fol. 412] MR. STANFORD: Your Honor, I would ask that this be entered into evidence and shown to the Jury.
MR. ROSEN: No objection.
THE COURT: Does counsel wish to be heard?
MR. SEPENUK: Is the other one in evidence, though?
MR. STANFORD: No, none of these five.
MR. SEPENUK: I believe that should go into evidence, too.
MR. ROSEN: I will object to that, Your Honor.

THE COURT: Counsel may come to the Bench.

AT THE BENCH:

MR. SEPENUK: As a matter of fact, I think they should all go into evidence.

MR. STANFORD: Your Honor, I have no objection to that at all. Mr. Rosen, of course, does. I did not specifically wish to put Mr. Bailey's picture to the Jury.

MR. SEPENUK: Aren't the other five the black and white?

MR. ROSEN: They are marked for identification.

THE COURT: What does the record reflect with reference to the pictures?

THE DEPUTY CLERK: The five were marked as [fol. 413] Government's Exhibits in the hearing, and they have been remarked as Defendant Bailey's Exhibits for the trial.

THE COURT: But they have not been—

MR. STANFORD: No, Your Honor.

THE COURT: —attempted to be put in?

MR. STANFORD: I did attempt to admit them into evidence, and the Court admonished me.

THE COURT: Yes, sir.

MR. SEPENUK: Excuse me. Has he orally stated he identified Ash that came out just now?

MR. STANFORD: Yes.

MR. SEPENUK: May I have that. If the two come in, I think they all should come in.

MR. ROSEN: I would object to Mr. Ash's picture. I don't want to see Mr. Stanford getting bad marks for my client.

MR. STANFORD: I have no intention of doing that. I feel if it clarifies more rapidly, shows the fact that John Lee Bailey's picture was seen by the witness and not identified, I think it might help. Could I take another look at them?

I withdraw the motion at this time since I almost hate to withdraw them.

MR. ROSEN: If the testimony—let me make a [fol. 414] prof- fer, if the testimony is that she denies identifying Bailey, isn't that without prejudice to Ash?

MR. STANFORD: All right, I will withdraw that, then.

MR. SEPENUK: Except she orally identified Ash.

MR. ROSEN: I have no objection to that, but you want Mr. Stanford to be the second crew for Mr. Ash.

MR. STANFORD: I don't have any intention of doing that. I withdraw that.

THE COURT: All right.

IN OPEN COURT:

MR. STANFORD: Your Honor, in view of the statement at the Bench, I will not ask specifically that the picture of John Bailey be shown to the Jury, but I would like to, without really being repetitious, to have it entirely clear in the minds of the Court and the Jury. The picture of John Bailey was shown to Mrs. Apple, but she did not identify that picture as being a man who was involved in the robbery.

THE WITNESS: That is correct.

BY MR. STANFORD:

Q And what date was that?

A Well, the robbery was several years ago.

Q The date that you showed her this photograph?

[fol. 415] A That was Tuesday. I am not sure what day it was.

Q It was some day earlier this week?

A That is correct.

Q Now, Mr. Berry, did you at any time show any other photographs to Mrs. Apple?

A No, I did not.

Q So you have no personal knowledge whether anyone else showed her pictures or how many times pictures were shown to her?

A No personal knowledge.

MR. STANFORD: I have nothing further.

MR. SEPENUK: May I have those for one moment? May we approach the Bench again, Your Honor?

THE COURT: Yes, sir.

AT THE BENCH:

MR. SEPENUK: I was thinking out loud on this now, I don't know if we want that picture to go into evidence. You know, this is a very good likeness of him. I think he looks far different today than he did.

MR. ROSEN: It is not going into evidence.

MR. SEPENUK: I think perhaps it should to bring it out completely. I think it should go in. In other words, I think by—

[fol. 416] MR. STANFORD: We have the issue as to whether or not he did look the same as he did look at the time. I think he does not.

THE COURT: Gentlemen, cut this down to the bone. Either side or either counsel may offer it in evidence, and Mr. Stanford has decided to offer it. Is that correct?

MR. STANFORD: Yes, I have so decided.

THE COURT: Do you now wish to offer it?

MR. SEPENUK: Yes, I think I will offer that.

THE COURT: All right.

MR. SEPENUK: I would like to—

MR. ROSEN: I would oppose it. My recollection is that she testified it looks like him, but she wasn't certain. I believe that was brought out in the hearing yesterday out of the presence of the Jury.

MR. SEPENUK: That has been opened by defense counsel, Your Honor.

THE COURT: I would be disposed to admit it regardless of who offers it. It has been the subject of testimony, and I think under the circumstances, the defense says they prefer the status in not getting into this thing. I don't like to go into it, as I told you. Once it has been [fol. 417] opened up, I think the Jury is entitled to make for what ever reaction it maybe produced. I just don't know. Should we introduce all five?

MR. ROSEN: That might avoid prejudice against Ash.

MR. SEPENUK: I can offer these photographs, and make a separate introduction, and that is the end.

MR. STANFORD: If that is the case, I would ask that I do that.

THE COURT: All right. Gentlemen, it doesn't make any difference.

MR. STANFORD: If you oppose it—I have been trying to—

THE COURT: All right.

MR. STANFORD: I don't wish to undercut Mr. Sepenuk.

MR. SEPENUK: It is all right.

THE COURT: Do you agree to all five?

MR. SEPENUK: Why don't we stipulate that all—can we stipulate that all five can go in?

MR. STANFORD: Why can't we do that?

THE COURT: All right.

IN OPEN COURT:

MR. SEPENUK: Your Honor, it has been stipulated [fol. 418] that Defendant's Exhibits 1 through 5 are in fact the five photographs shown by Agent Berry to Mrs. Apple, and it is further stipulated they may be introduced into evidence.

MR. STANFORD: That is so stipulated.

MR. ROSEN: So stipulated.

THE COURT: They may be received in evidence.

(Defendant Bailey's Exhibits Nos. 1 through 5 were received in evidence.)

THE COURT: Ladies and gentlemen, as I previously said about a stipulation, it is an agreed statement of fact, and you may accept it as undisputed evidence in the case.

MR. SEPENUK: I have no questions, Your Honor.

MR. ROSEN: I have nothing further.

MR. STANFORD: Your Honor, that is the case of John Bailey.

THE COURT: Thank you, you may be excused finally.

(The witness was excused.)

THE COURT: Anything further, Mr. Rosen?

MR. ROSEN: No, Your Honor, the Defendant Ash rests.

THE COURT: Does the Government have any rebuttal?

MR. SEPENUK: No, Your Honor.

THE COURT: Counsel come to the Bench, please.

[fol. 419] AT THE BENCH:

MR. ROSEN: For the record, I renew my motion for a judgment of acquittal.

MR. STANFORD: I so renew my motion.

THE COURT: The Court's ruling will be as previously announced to you, the motion for judgment of acquittal so far as Ash is concerned is denied. The Court will reserve as far as Bailey is concerned. All right.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 71-1255

UNITED STATES, PETITIONER

v.

CHARLES J. ASH, JR.

ORDER ALLOWING CERTIORARI—Filed June 12, 1972

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1972 471032 23

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES J. ASH, Jr.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia holding that an accused who is in custody generally has the right to have counsel present at a showing of photographs to prospective witnesses.

OPINION BELOW

The *en banc* opinions of the court of appeals (App. A) are not yet reported.[1]

JURISDICTION

The judgment of the court of appeals (App. C.) was entered on March 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The concurring opinion of Judge Bazelon in this case appears in *United States* v. *Brown*, No. 24,452 (App. B, p. 106a).

QUESTION PRESENTED

Whether, under the Sixth Amendment, an accused is entitled to the presence of an attorney at a showing of photographs to prospective witnesses which occurs when the accused is in custody.

STATEMENT

After a jury trial with one Bailey in the United States District Court for the District of Columbia, respondent was convicted in May 1968 on five counts charging him with having participated in the armed robbery of the American Security and Trust Company, East Capitol Street Branch, on August 26, 1965 (18 U.S.C. 2113(a); 22 D.C. Code 2901).[2] He was sentenced to imprisonment for five to fifteen years. The court of appeals sitting *en banc* reversed the conviction 5–4, on the ground that respondent had been denied his Sixth Amendment right to counsel at a showing of photographs by an F.B.I. agent to prospective witnesses shortly before the trial.

1. The pertinent facts are set forth in detail in the opinions below and are not in dispute. The robbery lasted some three or four minutes. A gunman entered the bank and ordered everyone there not to move. Seconds later another man dashed through the bank lobby to the tellers' cages, scooped up some money, and ran out again, followed by the gunman. Both the gunman and his accomplice wore stocking masks which covered portions of their faces.

On February 3, 1966, an F.B.I. agent interviewed

[2] Bailey was acquitted by the court after the jury failed to return a verdict.

four individuals (Mrs. Paugh, Mrs. Major, Mrs. Apple, and Mr. Taylor) who had seen the robbery or a part of it. At that point no arrests had been made.[2] The agent showed each of them a group of black and white police "mug" shots (including those of respondent and Bailey); all were of men of approximately the same age, height and weight as the two suspects. Each of the four selected the photograph of respondent as the gunman, although none of the witnesses was positive about the identification.

The trial began on May 8, 1968. On the day before, an F.B.I. agent together with the prosecutor visited Mrs. Pugh, Mrs. Major, and Mrs. Apple. The prospective witnesses were shown five color photographs, including one of respondent and one of Bailey. Only the pictures of respondent and Bailey were full length and bore police identification numbers. Each of the witnesses picked out respondent's photograph as resembling the gunman but again none of the witnesses was able to make a positive identification and none of them selected Bailey's photograph. The next morning prior to trial the agent showed the same set of photographs to Mr. Taylor, who could not make an identification. At no time was a lineup held. Defense counsel was not present at the photographic display on May 7 and 8.

The district judge held a pre-trial hearing to determine the admissibility of the prospective witnesses' identification testimony. Without deciding whether the showing of the color photographs was impermis-

[2] Apparently, respondent's photograph was included because of information received from an informant.

sibly suggestive, the district judge ruled that the government had established by clear and convincing evidence that the in-court identifications would have an independent basis and could be made in the presence of the jury. At the trial each of the four eyewitnesses made an identification of respondent as the gunman. Only one of the witnesses could make a positive identification. The others testified they were not absolutely sure that the respondent was the gunman (App. A, p. 85a).[4]

The May 7 and 8 showing of color photographs was not brought out on direct examination but was elicited on cross-examination by Bailey's counsel. Thereafter the government moved to have the color photographs introduced in evidence. Counsel for respondent objected to the introduction of his client's picture. After discussion between the judge and counsel, all of the photographs were admitted.[5]

2. The majority in the court of appeals declined to rule on the questions whether the showing of the color photographs was impermissibly suggestive and whether the district court's finding of independent source was correct. While noting that it would, if necessary, have remanded the case on the latter issue for further "elucidation by the trial court of the basis

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[4] The government also introduced testimony from the informer, McFarland, that respondent had asked him to help rob the bank, and that the day after the robbery respondent had told him that he had robbed the bank with Bailey.

[5] The majority and dissenting judges disagreed as to whether the objection made was sufficient to preserve the issue for appeal (App. A, pp. 7a, 63a–65a).

of its ruling" (App. A, p. 25a n. 20), the majority held that reversible error had occurred in the admission in evidence of the identifications made on the color photographs. In reaching this conclusion, it held broadly that, under the principles of *United States* v. *Wade*, 388 U.S. 218, an accused in custody, subject to certain possible exceptions, has the right to have counsel present at a government display of photographs to a prospective witness (App. A, parts III and IV).*

The dissenting opinions of Judges Wilkey and MacKinnon urged that neither the rationale of *Wade* nor any other decision of this Court furnished support for the majority's right-to-counsel holding, and that the district judge's finding of independent source was sound (App. A, pp. 27a–78a, 78a–84a).

*The possible exceptions mentioned by the court were (1) where the photographic showing comes after a valid lineup or other confrontation consistent with *Wade*, and (2) where the delay in securing the attendance of counsel would jeopardize the fairness of a continuing investigation. In an *en banc* opinion filed on March 1, 1972, the court of appeals held that counsel for the defendant was not required at an interview conducted by the prosecutor with a witness who was shown a photograph taken of a lineup at which she was not able to make an identification. Counsel for the defendant was present at the lineup. The majority held that counsel was not required at the interview because (1) the photograph was merely a "completely neutral and wholly exact reproduction [of the lineup at which counsel was present]" and (2) the possibility of suggestion in displaying the photograph was minimized by the "professional responsibilities * * * of the prosecuting attorney, and the defense counsel's right of cross-examination." *United States* v. *Brown*, supra (App. B, p. 98a).

REASONS FOR GRANTING THE WRIT

1. There is a conflict among the courts of appeals on the question whether a prospective defendant has a right to have counsel present at a showing of photographs to prospective witnesses who may identify defendant at trial. The Third Circuit, like the court below, has decided that *United States* v. *Wade*, 388 U.S. 218, which provided a right to counsel for lineups, is applicable to displays of photographs;[7] but seven other circuits have held *Wade* inapplicable to photographic displays. *United States* v. *Bennett*, 409 F. 2d 888 (C.A. 2), certiorari denied sub nom. *Jessup* v. *United States*, 396 U.S. 852; *United States* v. *Collins*, 416 F. 2d 696 (C.A. 4); *United States* v. *Ballard*, 423 F. 2d 127 (C.A. 5); *United States* v. *Serio*, 440 F. 2d 827 (C.A. 6); *United States* v. *Robinson*, 406 F. 2d 64 (C.C. 7); *United States* v. *Smith*, 423 F. 2d 1290 (C.A. 9), certiorari denied, 398 U.S. 930; *Rech* v. *United States*, 410 F. 2d 1131 (C.A. 10), certiorari denied, 396 US. 980.[8]

2. Whether an accused has under the Sixth Amendment a right to have counsel present at pre-trial photographic displays is an important question of constitutional law which should be settled by this

[7] *United States* v. *Zeiler*, 427 F. 2d 1305 (C.A. 3).

[8] The continued vitality and scope of *Wade* as applied to lineups are apparently implicated in *Kirby* v. *Illinois*, reargued March 20, 1972 (No. 5601, this Term). The decision in *Kirby* may therefore have a bearing on this case.

We note also that, in 18 U.S.C. 3502, enacted after the trial in this case, Congress clearly expressed its view that *Wade* should not be extended by enacting a provision that eyewitness testimony as to the commission of a crime shall be admissible in the federal courts.

Court. The decision below extends the Sixth Amendment's right to counsel beyond any prior decision of this Court. This Court held in *United States* v. *Wade*, 388 U.S. 218, that an accused is entitled to the assistance of counsel at a "confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit [an] identification," 388 U.S. at 228. Confrontations at lineups were found to be peculiarly susceptible to suggestive influences which create a grave risk of mistaken identification. Since these suggestive influences are often present in "many subtle ways," it is ordinarily impossible for an accused subsequently to demonstrate to a judge and a jury any impropriety which may have been present at the lineup, 388 U.S. at 229–230. The only recourse available for protecting the rights of the accused in these forced confrontations is, the Court held, to require the presence of counsel at the lineup.

There are, however, substantial differences between a forced confrontation at a lineup and a display of photographs to a witness. "A lineup is a little drama, stretching over an appreciable span of time. The accused is there in flesh, three-dimensional and always full-length. Further, he isn't merely there, he acts. He walks on stage, he blinks in the glare of lights, he turns and twists, often muttering asides to those sharing the spotlight. He can be required to utter significant words, to turn a profile or back, to walk back and forth, to doff one costume and don another." (Dissenting opinion of Judge Wilkey, App. A, pp. 29a–30a). There is a clear potential for improper suggestion in the lighting used, the demeanor of other participants as compared with

the accused, the clothing worn by the accused and the others as well as the words the accused may be required to speak. Wall, *Eyewitness Identification In Criminal Cases* 55–63. The inability of "unschooled" witnesses and uncounseled defendants to detect "suggestive influences" under these circumstances is apparent, 388 U.S. at 230.

A photographic display involves none of these subtle and undetectable influences. While a photographic display may also be suggestive, that fact can be easily demonstrated to the court and jury simply by requiring law enforcement officials to produce the photographs at the trial. The present case is illustrative of one in which the presence of suggestion in the photographic display was easily demonstrated. Any overt act on the part of law enforcement officers to suggest a particular photograph to a witness can be discovered by cross-examination of the witness.

In short, a lineup cannot be reconstructed. Its influence is fixed at the time, and leaves no way to show, at a later time, that there was improper influence, especially if counsel is not present. But a photographic display can be preserved exactly as it occurred. The photographs can be seen by the jury, and they can evaluate any charges of undue suggestiveness in the pictures shown. Though the difference may be one of degree, it is a clear and substantial distinction.

We have found no case holding that a defendant has the right to have counsel present during an interview of a witness held by the prosecutor or a law enforcement official. The holding of the court below

represents a substantial interference with the preparation of cases for trial, one that is not warranted, in our view, to protect any right of the accused. As Judge Friendly wrote in a case involving the same issue presented here, "to require that defense counsel be allowed or appointed to attend out of court proceedings where the [accused] is not present would press the Sixth Amendment beyond any previous boundary." *United States* v. *Bennett*, 409 F. 2d 888, 899–900 (C.A. 2), certiorari denied sub nom. *Jessup* v. *United States*, 396 U.S. 852. The question whether such an extension should be made is one that deserves the consideration of this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

MARCH 1972.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,340

UNITED STATES OF AMERICA

v.

CHARLES J. ASH, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

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Decided March 1, 1972

Judgment entered this date ←

Mr. Charles J. Ash, Jr. filed a brief *pro se.*

Mr. Jerome J. Dick (appointed by this court) filed a brief as *amicus curiae.*

Messrs. Thomas A. Flannery, United States Attorney at the time the brief was filed, *John A. Terry* and *William S. Block,* Assistant United States Attorneys, were on the brief for appellee. *Messrs. Roger E. Zuckerman, Harvey S. Price,* and *Robert C. Crimmins,* Assistant United States Attorneys, also entered appearances for appellee.

Before BAZELON, *Chief Judge,* and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges,* sitting *en banc.*

Opinion of the Court filed by LEVENTHAL, Circuit Judge, in which Chief Judge BAZELON, and Circuit Judges WRIGHT, MCGOWAN and ROBINSON concur. Chief Judge BAZELON also filed a separate concurring opinion at p. 26.

Dissenting opinion filed by WILKEY, Circuit Judge, in which Circuit Judges TAMM, MACKINNON and ROBB concur, at p. 27. Circuit Judge MACKINNON also filed a separate dissenting opinion, in which Circuit Judge ROBB concurs, at p. 78.

LEVENTHAL, *Circuit Judge:* On April 1, 1966, appellant, Charles J. Ash, Jr., and a co-defendant, John L. Bailey, were indicted on five counts relating to an armed robbery of the American Security and Trust Company, East Capitol Street Branch.[1] Ash was convicted by a jury on May 13, 1968, and in due course was sentenced to an effective term of five to fifteen years. The principal question presented by his appeal is whether his constitutional rights were violated by the introduction of certain pretrial photographic identifications obtained after arrest, and indeed after indictment, without notice to or presence of his counsel. It is fortunate for appellant that the issues concerning identification were raised in the brief filed by his appointed counsel before appellant sought and was granted leave to continue *pro se*. The points raised by appellant *pro se* have no merit.[2] But we find merit in the

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[1] Count one charged the crime of entering a federally insured bank with the intent to commit robbery therein, 18 U.S.C. § 2113(a); counts two and four, robbing two tellers in violation of 18 U.S.C. § 2113(a); counts three and five, robbing the same two tellers, this time in violation of 22 D.C. Code § 2901.

[2] Appellant also contends that the trial judge erred in refusing to allow him to see the grand jury minutes, and in refusing to allow him to put on certain testimony. We find no error in either of these rulings. Although appellant himself was denied opportunity to examine the minutes, his attorney was permitted to see them. The excluded testimony constituted only collateral impeachment. The exclusion would

issues as to identification raised in the brief filed by counsel, continued by this court on an amicus curiae basis. We reverse the conviction and remand for further proceedings not inconsistent with this opinion.

I. FACTUAL BACKGROUND

On August 26, 1965, a gunman entered the bank, waved his gun in the air, and ordered everyone in the bank not to move. A few seconds later another man dashed through the lobby of the bank to the tellers' cages, scooped up some money and ran out again, followed by the gunman. The robbery took place in about three or four minutes. At trial Ash was identified as the gunman. A bank teller, Mrs. Ruby Paugh, said Ash looked similar to the gunman, but she could not be certain because she could not see his face in view of the stocking mask. Another teller, Mrs. Jean Major, who likewise was unable to see the gunman's face, said she believed Ash was the gunman, but was not absolutely certain. A bank customer, Joseph Taylor, said Ash "looks sort of like" the gunman but he could not be certain. This witness had observed the gunman for a few seconds as he entered the bank, before he donned his mask. There was also an identification of Ash by Betty Apple, who was seated in an automobile outside, and said that outside the bank neither man wore a mask. She admitted she only got a "fleeting glimpse" of them and was not able to see their full faces.

It may be interjected that although Bailey was also identified in court by Mrs. Apple, there was a hung jury as to him. The trial judge granted his motion for acquittal.

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not have been reversible error even if the testimony had been offered by counsel.

Counsel raised the issue of denial of speedy trial, referred to in Part IV of this opinion.

Since the only other proof against Ash was the testimony of an informer who was under indictment for other offenses, it becomes material to consider carefully issues pertaining to the identification testimony.

The trial began May 8, 1968.[3] In the morning the court held a pre-trial hearing to determine whether the showing of photographs to the witnesses rendered their testimony inadmissible.

At this hearing it developed that at the time of the crime none of the four identification witnesses was able to give the police a description of the gunman's facial characteristics. The description given to police at the time of the robbery was not in terms of facial features but rather, *e.g.*, by height and weight—that the gunman was tall and slim. The police call for the gunman described him only as Negro male, 19 years old, six feet tall, 165 pounds, thin build.

At the hearing FBI Special Agent Patrick Markowvich testified that on February 3, 1966, some 5 months after the crime, he interviewed Mrs. Paugh, Mrs. Major, Mrs. Apple and Mr. Taylor concerning the robbery in order "[t]o attempt to effect an identification." The agent showed each of them a group of black and white police mug shots of the faces of five Negro males, including appellant and Bailey, all of "generally the same age, height and weight as Mr. Bailey and Mr. Ash." Apparently, Mr. Ash's photograph was included because of information received from one Clarence McFarland, an informer

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[3] The long delay was due to a number of factors. Appellant filed numerous *pro se* motions in the trial court, and changed counsel no fewer than four times. Appellant also underwent two psychiatric examinations at St. Elizabeths to determine his competency to stand trial. Trial was also continued on a number of occasions because of the unavailability of Government counsel.

charged with other crimes (see note 7, infra). Agent Markowvich testified that all four witnesses selected the photograph of appellant as the gunman. On cross-examination he testified "[t]hey were not positive in the identification." Asked if any of them was positive, he cited Mr. Taylor—who had seen the gunman before he donned his mask—and testified that "Mr. Taylor said that to the best of his belief" Ash was the gunman "but he could say positively if he could see him in person." (Tr. 16). Mrs. Apple said the photo "looked like" Ash but she wasn't sure. Mrs. Apple identified Bailey's photograph as that of the second robber. A few weeks later Mrs. Apple also pointed out Bailey to police in a corridor of the General Sessions Building.

Special Agent Hugh Berry of the FBI testified that on May 7, 1968, the day before trial, together with the prosecutor, he visited, and showed five color pictures to, Mrs. Paugh, Mrs. Major and Mrs. Apple. Each of these witnesses picked out appellant's picture, but none selected Bailey's. On the morning of trial Agent Berry showed the same photos to Mr. Taylor, who was unable to make an identification.

Of the five color photographs, only appellant's and Bailey's were full-length; they were pictured standing next to a pole, possibly a height marker, which had attached to it a plaque bearing police identification numbers. These numbers were covered up by the exhibit sticker at trial,[4] but apparently were uncovered when the photos were shown to the four witnesses. Of the three remaining pictures, one terminated at the subject's thigh, one at the waist, and another at the lower chest. None of these three photographs bore police identification numbers.

One of the eyewitnesses, Mrs. Paugh, also testified. She

[4] To avoid prejudice under the ruling of Barnes v. United States, 124 U.S.App.D.C. 318, 365 F.2d 509 (1966).

said that she could not surely identify anyone, and that all she could do, when questioned or shown photographs, was to make an identification "as to the general build of the person." She stated that the color photographs shown her the day before had not had the effect of refreshing her recollection or recreating in her mind an image of the person she saw at the time of the robbery.

The judge ruled that the four prosecution witnesses would be permitted to make an identification of appellant at trial[5]—and they gave testimony as set forth above. None of them was questioned on direct concerning the photographs. Bailey's counsel was interested in bringing out that Mrs. Apple had not identified Bailey's color photograph. Counsel for Ash objected to any procedure that would "make the proffer to show pictures of Ash." Accordingly Bailey's counsel confined his questioning of Mrs. Apple to establishing that Mrs. Apple had been shown five color photographs. Later, Bailey's counsel elicited from FBI agent Berry that Mrs. Apple had made no identification on being shown a color photograph of Bailey.

When counsel for Bailey offered the Bailey photograph, the prosecutor insisted on admission of all five

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[5] At this juncture the judge ruled that the Government had met its burden of showing that the identification was based on observation of the suspect other than the intervening photographic presentation. The following day, when pre-trial questioning of Mrs. Apple by Bailey's counsel went into the subject of color photographs, apparently to elicit that they were suggestive, the judge sustained the prosecutor's objection, saying that "the question is whether the identification was unnecessarily suggestive," and that this was a question for the trial court. We do not see how this comment justifies the limitation of the testimony, but it suffices at this point to note that the judge did not make a finding that the color photographs were not unduly suggestive, and if anything the finding of independent source rested on an assumption that they were unduly suggestive.

color photographs shown to Mrs. Apple. Counsel for Ash objected (Tr. 413): "I would object to Mr. Ash's picture. I don't want to see Mr. Stanford [Bailey's counsel] getting bad marks for my client." In view of this objection, Bailey's counsel withdrew his offer of a photographic exhibit, being content to rely on testimony that Bailey's photograph had not been identified. In due course such testimony was adduced, and he announced that he had completed his questions of the FBI agent (Tr. 413-15). But at this point the prosecutor interjected and insisted that the photographic evidence should be admitted. In due course he made a formal offer (Tr. 416), and the judge ruled it would be admitted (Tr. 416). The court's ruling on the color photographs was plainly based on an assumption contrary to our view, developed later, that the admission of the color photograph of Ash was constitutionally impermissible, and prejudicial error.[6]

The Government also presented in its direct case the testimony of Clarence McFarland, who was then serving a sentence in connection with another robbery. Mr. McFarland, whose extensive criminal record was brought out on direct examination, testified that on August 25, 1966, the day before the American Security robbery, ap-

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[6] If the trial judge had been in accord with our constitutional premise, we are confident that he would—and we hold that he should—have sustained the objection of Ash's counsel, and not have ruled, as he did, that the photographs were admissible because the subject of photographic identification had been "opened up" by "the defense," meaning counsel for Bailey.

The threshold objection of Ash's counsel was not waived, in our view, by his accession—in the face of the court's ruling—to a procedure whereby (a) all five photographs would be admitted ("that might avoid prejudice against Ash"), and (b) be admitted by stipulation—to resolve a squabble whether the photographs, already held admissible, should be offered by Bailey's counsel or the prosecutor.

pellant had asked him to help rob the bank, but McFarland refused to go along. McFarland stated that he next saw appellant on August 27, sitting with Bailey at Cecilia's Lounge on Seventh and T Streets. According to McFarland appellant told him that he had robbed the bank of approximately $3,100, and that he was angry with Bailey for leaving him in the bank. McFarland was cross-examined as to whether he had been promised certain "favors" in connection with several cases pending against him. The defense later called an Assistant United States Attorney who testified, *inter alia*, that he had indicated he would testify before the parole board in McFarland's behalf.[7]

II. PROBLEM OF SUGGESTIVENESS IN THE VIEWING OF THE COLOR PHOTOGRAPHS

Appellant claims that the pre-trial photographic identifications, and the suggestive circumstances surrounding them, tainted the identification testimony of the four eyewitnesses and thus deprived appellant of due process. *Stovall v. Denno*, 388 U.S. 293 (1967). This claim requires a showing that "the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968).

There are undeniably troublesome aspects concerning the photographic identifications. Because three of the five

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[7] It appears from the testimony of these witnesses that McFarland had been before the grand jury with regard to five separate offenses, in addition to his bank robbery, and had not been indicted on any of them, including one in which he had confessed guilt. The Assistant United States Attorney had arranged to have McFarland transferred from the D.C. Jail to a local jail in Rockville, Maryland, and in addition had helped McFarland's wife move from Southeast Washington to an apartment near the parochial school that McFarland's children were due to attend.

black and white photos were unaccountably lost (see note 18), we cannot make a detailed analysis of the February 1966 identifications. However it is not without significance, in terms of perspective, that in seeking an identification with black and white photographs in February 1966, five months after the crime, the agents used facial mug shots as the vehicle for that identification, when in fact the witnesses had described the robbers to the police only in terms of height, weight, age and build. Though the identifications were "not positive," and one of the witnesses expressly besought an opportunity to see the subjects in person, no arrangements were made for a lineup.

As to the May 1968 identifications, from color photographs shown on the eve of trial, the pictures are present in the record before us. It will be recalled that the only description at the time of arrest was in terms of being tall and of thin build. The color photographs in the record show that both Ash and Bailey are tall and slender, while the other three men whose photographs were used appear to be of stocky build. Despite the witnesses' reliance at the time of the crime on description in terms of bodily characteristics, only Ash and Bailey are pictured full-length; the other three subjects are cut off at mid-thigh, waist, and mid-chest, respectively. Finally, the photographs of Ash and Bailey, shown standing next to height poles, bear police identification numbers, while there are no such numbers on the other three photographs.

Without at the moment fixing the ultimate legal consequences it cannot be gainsaid that there are at the very least strong elements of suggestiveness in this color photo confrontation. The possibility of suggestiveness is not negatived by the witness's weak response, for as Judge MacKinnon cogently pointed out—in the course of holding unduly suggestive a policeman's presentation of colored photographs to the witness in the course of preparing for

trial—"[T]he focus is on the photographic display itself and not on the reaction of the witness to it." *United States v. Gambrill*, —— U.S.App.D.C. ——, 449 F.2d 1148 (1971). And the elements of suggestiveness cannot be justified on the ground of necessity, like that urged in *Stovall*. With the February 1966 photographic (black and white) identification yielding only tentative results, there was full opportunity to hold a lineup, organized so as to avoid any suggestiveness, during the two pre-trial years when appellant was in detention.

Certainly the elements of suggestiveness were strong enough so that it cannot be assumed that there was no undue suggestiveness in the absence of explicit findings by the trial court. As we have already noted (fn. 5), the court made no such finding, and if anything its independent source determination rested on an assumption of undue suggestiveness. If it were established that there was a legal defect in the showing of the color photographs the day before trial then as noted below (see fn. 20), it would be hard to accept the conclusion that they did not affect the in-court identification.

We are aware that there are indications offsetting in part the inference of undue suggestiveness. But they are hardly conclusive. The identifications at trial were weak, and in fact no stronger than those given two years before on the basis of the mug shots. In some cases the weakness of in-court identification may be a factor tending to indicate that pre-trial identification, though improper, failed to influence the witness's testimony. Here, however, it was almost three years since the events in the bank in August 1966, events that passed swiftly, with appellant's face seen by only two witnesses and by each of them only fleetingly. The color photographs in May 1968 can hardly be justified on the ground that the witnesses' 1968 recollection had been reinforced by the showing of the black and white photographs in February 1966, even assuming that was

entirely proper, since that was not only remote in time but was a showing of facial mug shots to witnesses who had not given a description in terms of facial characteristics. In the absence of intervening reinforcement by the color photos the in-court identification might well have been diluted to less than even a scintilla of substance. That the color photos may have been material in enabling the witnesses to provide a weak identification of the gunman in court is not negatived by the fact that the witnesses had such a void in the recollection of the unarmed offender that it was not revived by the color photographs.

We could not reject appellant's substantial claim of impermissible suggestiveness without a more thorough hearing and more definite findings than this record presents. But we do not remand for this purpose because there is another objection to the photographic identification that establishes the need for reversal.

III. APPELLANT'S CONSTITUTIONAL RIGHTS WERE DENIED BY GOVERNMENT'S SHOWING OF COLOR PHOTOGRAPHS TO WITNESSES WITHOUT ATTENDANCE OF COUNSEL

We do not find it necessary to determine whether appellant's Fifth Amendment rights were violated because the color photographs were impermissibly suggestive. In the circumstances of this case, defendant's constitutional right to counsel at critical stages of the prosecution was violated when the Government, having him in custody, and having failed to arrange a corporeal lineup, made a photographic presentation to witnesses without attendance of counsel. The Government's insistence on admission of these color photographs at the trial produced reversible error.

A corporeal lineup is a "critical stage" of the prosecution at which defendant is entitled to the aid of counsel,

even though held prior to trial or even to the filing of formal charges. *United States v. Wade*, 388 U.S. 218 (1967). This court has been explicit to confirm the latitude and authority of the police to secure a suspect's participation in a timely lineup, with counsel present, even though he is eligible for release on recognizance or bail, precisely because this is the means that best combines and assures both effectiveness and integrity of law enforcement investigation procedures. *Williams v. United States*, 136 U.S. App.D.C. 158, 161, 419 F.2d 740, 743 (en banc 1969); *United States v. Greene*, 139 U.S.App.D.C. 9, 429 F.2d 193 (1970); *Adams v. United States*, 130 U.S.App. D.C. 203, 399 F.2d 574 (1968), *cert. denied sub nom Roots v. United States*, 393 U.S. 1067 (1969).

In this case the Government did not avail itself of the opportunity it had, following defendant's arrest, to hold a corporeal lineup. The presentation of color photographs subsequent to arrest—indeed on the eve of trial—was like a lineup as being a critical stage of the prosecution, requiring presence of counsel for Ash, within the meaning of *Wade*.

It is contended that *Wade* has no application whatever to pre-trial photographic identifications. We are aware that a majority of the courts that have ruled on the question have held *Wade* inapplicable to photographic viewings and identification.[8] Some courts have mentioned the

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[8] *See, e.g.*, United States v. Bennett, 409 F.2d 888 (2d Cir.), *cert. denied sub nom* Haywood v. U.S., 396 U.S. 852 (1969); United States v. Ballard, 423 F.2d 127 (5th Cir. 1970); United States v. Robinson, 406 F.2d 64 (7th Cir.), *cert. denied* 395 U.S. 926 (1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied* 394 U.S. 908 (1969); Baldwin v. State, 5 Md.App. 22, 245 A.2d 98 (1968); State v. Stamey, 3 N.C.App. 200, 164 S.E.2d 547 (1968); People v. Lawrence, 39 U.S.L.W. 2532 (Calif. Sup. Ct. 3/5/71).

question without deciding it.[9] Other decisions hold that *Wade* is applicable, or at least may be applicable in some measure, to photographic identification.[10]

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[9] Some courts have refused to decide the issue, either because the identification occurred prior to *Wade*, or there was evidence of independent source or the record did not present the issue adequately. United States v. Butler, 426 F.2d 1275 (1st Cir. 1970); United States v. Marson, 408 F.2d 644 (4th Cir. 1968) (Winter, J., concurring and dissenting), *cert. denied* 393 U.S. 1056 (1969); United States v. Quarles, 387 F.2d 551 (4th Cir. 1967), *cert. denied* 391 U.S. 922 (1969); United States v. Valez, 431 F.2d 622 (8th Cir. 1970).

[10] United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970); Commonwealth of Pennsylvania v. Whiting, 439 Pa. 205, 266 A.2d 738, *cert. denied*, 400 U.S. 919 (1970). See also United States v. Marson, *supra*, note 9 at 651 (Winter, J., concurring and dissenting); Thompson v. State, 451 P.2d 704 (Sup. Ct. Nev.), *cert. denied*, 396 U.S. 893 (1969).

Zeiler involved two trials. As to each trial, reversal was held required because the prosecution had elicited the previous identification of Zeiler during the pretrial exhibition of photographs: "This error in itself requires reversal of both convictions." 427 F.2d at 1307.

As to the conviction obtained in the "second trial" held in June 1968, the court remanded for a new trial at which the witness "shall not be permitted to identify the accused," because it inspected the photographs shown to the witnesses, concluded they were "unnecessarily suggestive," and thought the District Court's determination that the prosecutor had established that the in-court identification had not been influenced by the prior improper photographic confrontation "was not a permissible conclusion." (427 F.2d at 1308).

As to the conviction in the "first trial" held in January, 1968 (Criminal No. 67-186), the court did not know "what photographs were shown to the identifying witnesses in the absence of counsel." It therefore remanded for a hearing on the admissibility at retrial of in-court identification. In a subsequent opinion, following the remand, the court determined that the Government had established by clear and

While we are aware of the view of a majority of the courts that have considered the matter, we are equally aware of instances in which the view advanced by a majority of circuit courts of appeals was rejected, and the contrary view of one or two circuits was finally upheld, by the Supreme Court. See, *e.g.*, Kaufman v. United States, 394 U.S. 217, 220 (1969) (sustaining the position taken by the 4th and 10th Circuits, and rejecting the position taken by the 2d, 3d, 5th, 6th, 7th, 9th and D.C. Circuits); Simmons v. United States, 390 U.S. 377, 392 (1968) (sustaining the position taken by the D.C. Circuit; rejecting the position taken by the 4th, 5th, 7th, 8th and 10th Circuits); Putnam v. Commissioner, 352 U.S. 82, 84 (1956). The opinions of other appellate courts merit careful attention and consideration, and this we have accorded, but they are not controlling as precedent. Bound by our oath of office to give independent consideration to the constitutional claims, we conclude they should be sustained.

We conclude that the sound rule prescribes that in general, subject to certain exceptions, *Wade* and its requirement of presence of counsel, are applicable to a Government exhibition of photographs of a person in custody for an offense to witnesses called to identify the person who committed the offense.

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convincing evidence that in-court identifications by the witnesses involved would "have an origin independent of any photographic identification made outside the presence of counsel." *United States* v. *Zeiler*, 447 F.2d 993 (3d Cir. 1971). For purposes of determining this issue, the court naturally considered whether the photographic identification was suggestive. However, testimony of the photographic identification itself was impermissible—and required a new trial whether or not "suggestive"—because of the court's rule that "once an accused is taken into custody, he is entitled under the Sixth Amendment to have counsel present whenever law enforcement authorities confront witnesses with a series of photographs for identification." 447 F.2d at 994.

The Third Circuit, on reconsideration of the problem, held in *Zeiler* (cited fn. 10) that once a defendant is taken into custody, he is entitled to have counsel present at any subsequent photographic lineup. While we think the rule is subject to exceptions, we agree with *Zeiler's* analysis that the dangers of mistaken identification from uncounseled lineup identifications set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications. These include, notably, the possibilities of suggestive influence or mistake—particularly where witnesses had little or no opportunity for detailed observation during the crime; the difficulty of reconstructing suggestivity—even greater when the defendant is not even present; the tendency of a witness's identification, once given under these circumstances, to be frozen. While these difficulties may be somewhat mitigated by preserving the photograph shown, it may also be said that a photograph can preserve the record of a lineup; yet this does not justify a lineup without counsel. The same may be said of the opportunity to examine the participants as to what went on in the course of the identification, whether at lineup or on photograph. Sometimes this may suffice to bring out all pertinent facts, even at a lineup, but this would not suffice under *Wade* to offset the constitutional infringement wrought by proceeding without counsel. The presence of counsel avoids possibilities of suggestiveness in the manner of presentation that are otherwise ineradicable.

The Pennsylvania Supreme Court, following *Zeiler*, stated in its *Whiting* opinion (cited in note 10):

> "As for the photographic lineup employed in the instant case, the necessity for counsel at that confrontation, is implicit in *Wade*, which factually concerned a corporeal lineup. *Wade* cannot be undercut simply by substituting pictures for people, nor can the police prepare a witness for the lineup by privately showing the witness pictures of the accused."

We note that the Supreme Court denied certiorari in

Whiting (see note 10). We note, too, that in its brief to the Supreme Court in the *Wade* case the Government argued (Br. 34, October Term 1966, at p. 7): "There is no meaningful difference between a witness' pretrial identification from photographs and a similar identification made at a lineup."

The precedents contrary to *Zeiler* are to some extent conclusionary, rather than analytical, and to some extent based on erroneous premises. The most analytical is *United States v. Bennett, supra,* wherein Judge Friendly concluded that the Sixth Amendment has no application to "out-of-court proceedings where the defendant himself is not present." 409 F.2d at 899. This is, we think, too narrow a reading of this Sixth Amendment right. It is Judge Friendly's view that a major purpose behind the right to counsel is to protect the defendant from errors that he himself might make if he appeared in court alone, and that this rationale has no relevance to situations where the defendant is not present. See 409 F.2d at 900. However, *Wade* itself demonstrates the possibility of other forms of prejudice, resulting not from actions of the defendant but from manipulations by others, that require counsel to be present. The fact that in one instance the manipulation may be of the defendant's body, as in a lineup, and in another instance may be of his photograph, does not remove the need for protection.

Nor do we agree with the assertion in some decisions (*supra* note 8), that the application of *Wade* to photographic viewings held under the auspices of a prosecutor is tantamount to a requirement of counsel at every conference between the prosecutor and Government witnesses. As this court has noted, there is a crucial distinction between these two situations. The prosecutor cannot introduce testimony on direct of the statements given by a witness in an earlier interview with the prosecutor. But he

may introduce the witness's prior identification. *United States v. Kirby*, 138 U.S.App.D.C. 340, 342, n.2, 427 F.2d 610, 612, n.2 (1970). If the witness's photographic confrontation was lawful, as the Government now contends, it would not only have independent standing as evidence, but indeed, as this court has already pointed out en banc, the testimony of a witness's pre-trial identification is likely to have far more weight with the jury than the taken-for-granted in-court identification. *Clemons v. United States*, 133 U.S.App.D.C. 27, 40, 408 F.2d 1230, 1243 (en banc 1968), *cert. denied*, 394 U.S. 964 (1969). If the pre-trial identification is not deficient, and the witness is available for cross-examination, it is considered to have greater probative value than the in-court identification. *Id.* To say that the nature of a photographic viewing inherently establishes it as less than a critical stage of the prosecution is to blink reality.

There are instances in which a photographic exhibition —even though an event capable of being adduced at trial— is too preliminary and preparatory to be regarded as a critical stage of the prosecution requiring attendance of defense counsel. Certainly when a case is in the pre-arrest investigative stage there is justification for photographic viewings, assuming no undue suggestiveness, *Simmons v. United States*, 390 U.S. 377 (1968). There is obvious need in terms of effective police investigation to ask the victim or other witness to view photograph books organized by the police in terms of modus operandi and nature of offense.

The Court recognized in *Wade*, 388 U.S. at 227-8, that certain "preparatory step[s] in the gathering of the prosecution's evidence . . . are not critical stages."[11] This

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[11] Since a photographic lineup is as much subject to the risk of influence and mistake as a corporeal lineup, it is clearly distinguishable from other investigative techniques,

court has held that photographic viewings at the pre-arrest stage are not subject to the requirements of *Wade* and may be conducted in the absence of counsel or substitute counsel for the suspect. *United States v. Kirby*, 138 U.S.App. D.C. 340, 427 F.2d 610 (1970). In *United States v. Hamilton*, 137 U.S.App.D.C. 89, 91, n.6, 420 F.2d 1292, 1294, n.6 (1969), we stated: "Counsel at an identification session designed to narrow the field of suspects, at a time when no one has been charged and there is no one in particular to represent, is an obvious impracticality." In *Kirby*, however, we left open (see 427 F.2d at 612, n.2) the question, whether "a right of counsel for photographic identification might be urged as to defendants who have been taken into custody on cause of having committed the offense."

Essentially we are in accord with the premise of *Zeiler* that "[t]he considerations that led the court in *Wade* to guarantee the right of counsel at lineups apply equally to photographic identifications conducted after the defendant is in custody," see 427 F.2d at 1307. There may be a limited exception to this requirement, derived from special circumstances, as in exceptional cases where there is an on-going investigation and time is of the essence, even though, as *Zeiler* noted, the need for photographs as a tool of investigation "is in most cases unnecessary" after the accused has been taken into custody. (See 427 F.2d 1307, note 3.) To the extent that there may be an exception it would be limited to a case of special circumstances, as in a case of investigative necessity where even the slight

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such as the analysis of fingerprints, blood samples and the like, which the Supreme Court in *Wade* held to be mere "preparatory steps" not subject to the Sixth Amendment right to counsel. *Wade, supra*, at 227. These modes of circumstantial proof, depending as they do on scientific and technical comparisons, lack the risk of error, or at least undetectable error, that attends the more subjective comparison between memory and photograph.

delay involved in attendance of counsel or substitute counsel would not be feasible without jeopardizing the effectiveness and fairness of continuing investigation. The police have a responsibility to proceed, taking the identification process as a whole, so that such an uncounseled photographic confrontation does not unnecessarily undercut the reliability of the subsequent counseled lineup.

There is no possible basis for invocation of the exception, for special circumstances like investigative necessity, in a case like that of *Ash*, where the Government officials failed to use their opportunity to arrange a corporeal lineup prior to indictment, and the photographic exhibition, without notice to counsel, to the eyewitnesses known to the police since the crime came not only after defendant's arrest but after the indictment had issued and trial counsel had been appointed, and the day before the trial was to start. These facts not only decisively eliminate the possibility that this case comes within the exception rather than the general rule requiring counsel at post-arrest exhibition of photographs, but they establish an independent requirement of counsel even if *Wade* were not generally applicable to post-arrest exhibition of photographs; for it has been clear since *Massiah* v. *United States*, 377 U.S. 201 (1964), that the existence of authority in the police to continue investigations of suspects becomes subject to a constitutional obligation that precludes the use of evidence gained from him after indictment in the absence of his counsel.

We think it appropriate to develop considerations underlying our emphasis on the failure of the Government to arrange a corporeal lineup. We begin this discussion by noting, as the Supreme Court recognized in *Simmons*, that while a photographic viewing plays a useful role in effective investigation, particularly in the early stages, it inherently involves inescapable "hazards," (390 U.S. at 384), and may reflect significant shortfalls in reliability

even when not so impermissibly suggestive as to rise to the level of denial of due process, see 390 U.S. at 386, n. 6. An identification of a photograph, even out of a group, is manifestly of lesser stature and reliability than identification of the suspect himself out of a corporeal lineup. The reliability of a corporeal lineup is of course heightened by the attendance of the counsel or substitute counsel required under *Wade*. Such counsel have an appropriate role in remarking on any suggestivity in the lineup "and proposing changes to avoid suggestive features," see United States v. Allen, 133 U.S.App.D.C. 84, 408 F.2d 1287, 1289 (1969). This role is particularly meaningful in conjunction with that part of *Allen* which puts forward the concept that the description of the suspect given by the witness to the police be available, see Spriggs v. Wilson, 136 U.S.App.D.C. 177, 419 F.2d 759 (1969). The law enforcement authorities also have an interest in avoiding detention or protracted detention of the innocent, and their exoneration is indeed one of the reasons set forth in *Simmons* (390 U.S. at 384) for pre-arrest scrutiny of photographs.

This court has an abiding concern for and interest in ensuring a combination of fairness and intelligent and effective techniques in law enforcement. That is the hallmark of a decent society concerned with both order and justice. It has led us in the past to countenance personal confrontations that were both suggestive and in the absence of counsel when the circumstances, close in time and place to the offense, enhanced reliability for law enforcement and thus enhanced fairness.[12] This results not only

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[12] Russell v. United States, 133 U.S.App.D.C. 77, 79-81, 408 F.2d 1280, 1282-84, *cert. denied*, 395 U.S. 928 (1969), citing Wise v. United States, 127 U.S.App.D.C. 279, 282-83, 383 F.2d 206, 209-10 (1967), *cert. denied*, 390 U.S. 964 (1968).

in a "balance of pertinent interests," [13] but in mutually reinforcing goals, as the same procedures result in both release of the innocent and enhanced opportunity to renew the search for and to apprehend the guilty, serving in both respects to further the proper interest of all citizens. These concerns stand at zenith for this court, which has jurisdiction and responsibility to supervise the administration of justice concerning the broad sweep of serious street crimes that beset the Nation's capital, crimes in which identity is typically the central question.

Our judicial concern is for an approach to identification procedures that combines fairness with police responsibility and effectiveness. The police are likewise concerned with such a sound approach. We observe with approval that pertinent D.C. Metropolitan Police Regulations have instructions geared both to fairness of photographic identification and to assuring a follow-on corporeal lineup.[14] The police concern with fair and timely identification procedures assures identifications that are (a) more reliable and (b) admissible in court—and with more impact than any in-court identification.[15]

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[13] See Wise v. United States, *supra* note 12, 127 U.S.App. D.C. at 283, 383 F.2d at 210.

[14] The D.C. Metropolitan Police regulations dealing with photographic identification provide that a suspect's photograph must be grouped with at least eight others of the same general description, that adequate records of the photographs must be kept, and that each witness must view the photographs out of the immediate presence of other witnesses. They also provide that the police shall notify the prosecutor so that arrangements can be made in order to assure that the photographic identification is followed by a corporeal lineup. *Memorandum Order on Procedures for Obtaining Pretrial Eyewitness Identification*, May 15, 1970).

[15] The fair pre-trial identification procedures also reduce the possibility of any constitutional interposition against an in-court identification, and of a claim that this must override

It was the combined interests of fairness and effective police administration that led this court to approve judicial orders, on application of the prosecutor, that reinforced the long-standing police recognition of the need for corporeal lineups for persons taken into custody on photographic identification,[16] by requiring the attendance at a police-conducted lineup of persons released on recognizance or bail.[17] Orders may likewise be issued at the request of defense counsel, as has been done by various district judges in pretrial procedures.[18]

We do not consider in this opinion whether or to what extent its principle should be applicable in case of a photographic showing subsequent to a lineup. We make this clear because the judges concurring in *Ash* have differed in their votes in *United States* v. *Brown, Proctor and Williams*, No. 24,452, a companion case to *Ash*, opinion filed

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the provision, in 18 U.S.C. § 3502, for the admissibility of in-court identification by eyewitnesses.

An in-court identification is taken for granted by the jury, especially since the trial setting itself focuses on the defendant at counsel table with a "strong suggestiveness," see United States v. Gambrill, *supra*, 449 F.2d at 1158.

[16] See, *e.g.*, Dorman v. United States, 140 U.S.App.D.C. 313, 325, 435 F.2d 385, 398 (en banc 1970).

[17] Williams & Coleman v. United States, 136 U.S.App.D.C. 158, 161, 419 F.2d 740, 743 (en banc 1969); Adams v. United States, 130 U.S.App.D.C. 203, 399 F.2d 574 (1968).

[18] United States v. McNair, 140 U.S.App.D.C. 26, 433 F.2d 1132 (1970). The judge may order that the lineup be conducted, of course in the presence of counsel, by the police, and thus take advantage of facilities of space, photography and personnel geared to fair lineup procedures. If the prosecution has good reason for deferring disclosure of the names of identification witnesses, the court may issue an appropriate protective order, or may consider lineups conducted on the eve of trial or during its course.

this day. The dissenting opinions in *Brown* set forth the views of some of the judges concurring in this *Ash* opinion that its principles should in logic and fairness be extended to that case. Judge McGowan and I concluded that safeguards adequate for constitutional right of presence of counsel were present in *Brown*.[19] But the differences among us relate to cases other than *Ash*, and do not qualify the concurrence, of all the judges voting for reversal of the Ash conviction, in the *Ash* opinion's statement of the principles which we conclude require reversal.

[19] Judge McGowan and I would stress the presence of defense counsel at the prior corporeal lineup, as protecting against identification errors attributable to mischance, clumsiness or excess police zeal, and the limitation of the *Brown* ruling to presentation of a photograph of such a counseled lineup, to a witness who attended that lineup, by the prosecuting attorney. We considered the possibility of prejudice to be minimal and the sound functioning of the prosecuting attorney's preparation for trial to be material.

We were aware that there can be no absolute guarantee against possibility of prejudice to the defendant, but concluded its minimal quality was underscored by the prosecuting attorney's awareness of the need for a complete and candid exposition of any process resulting in a change from the failure of the witness to make the identification when defense counsel was present at the lineup. It is perhaps not immaterial that the Brown trial, following our en banc order of March 15, 1971, permitting the photographic identification, resulted in an acquittal.

It is the premise of our *Brown* ruling that the problem of impedance of justice by steering is so insubstantial in the case of a prosecuting attorney—who has standing as an officer of the court, apart from the deterrence inherent in his jeopardizing of his professional career—as not to warrant the hindrance on the straightforward preparation for trial by busy prosecuting attorneys that would be involved in a second attendance by defense counsel at a showing of a photograph of a lineup already attended by defense counsel at the corporeal stage.

Another case where there was a corporeal lineup was *United States* v. *Hines & Ware*, No. 23,281, November 1, 1971. This court there decided that when a witness has already identified the defendant at a counseled lineup the prosecutor may, without advance notification of defense counsel, review the identification already made by the witness through the use of photographs, to refresh his memory, in a session preparatory for his testimony at a court hearing. The same rule was also applied as to a witness whose prior identification of defendant was at a confrontation that was not attended by counsel because it came within the exception of *Russell v. United States*, (cited *supra*, note 12). In these cases, where the witness had already made a reliable physical identification, there was a safeguard lacking in *Brown*, where the witness failed to identify the defendant when she attended counseled lineup. But *Brown* is limited—as has been noted—to the use of a photograph of the counseled lineup.

IV CONCLUSION AND REMAND ORDER

Although there was no requirement of counsel at the presentation of black and white photographs in February, 1966, these were facial photographs, shown to witnesses who had not given the police any description of facial features. The identifications were "not positive," and indeed the witness who was most clear only made an identification to the best of his belief, saying he could be more positive if he could see defendant in person. Yet there was no arrangement for a corporeal lineup. In 1968, on the day before trial, long past the time when active investigation of the case had ceased, the Government showed color photographs to the witnesses, without notice to defense counsel. We hold this 1968 showing was a "critical stage" of the prosecution, at which defense counsel's presence was required unless waived. There was prejudicial error at the trial when the prosecutor insisted that the jury

see the color photograph of Ash, entrenching that pre-trial identification, and notwithstanding the objection of counsel for Ash pointing out the prejudice to Ash the trial court ruled it would be received in evidence.

Appellant is entitled to a new trial at which the court will exclude prosecution evidence of the identifications made on the color photographs. At that trial the prosecution may tender witnesses to make in-court identifications of Ash. If it had been necessary to decide that issue as to the trial already held we doubt that we could sustain a finding of independent source.[20] But the situation may be different as to in-court identification testimony offered at a new trial,[21]

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[20] The Government has the burden of proving independent source by clear and convincing evidence. Here the witnesses could refer only to the observations at the time of the crime, 33 months before, which, because of disguise or fleeting character of the observations, were of such a nature that the description given by the witnesses to the police made no reference whatever to facial characteristics. In view of such considerations, and the absence of a lineup, it is hard to see how the Government can be held to have shown, by clear and convincing evidence, that these color photographs did not affect the in-court identification made one day later. (Anthony) Long v. United States, 137 U.S.App.D.C. 311, 316, 424 F.2d 799, 804 (1969), United States v. Gambrill, *supra*.

The trial court did not address itself to these considerations when it made an independent source ruling. If it had been necessary to decide that issue, we would at a minimum have remanded for elucidation by the trial court of the basis of its ruling.

[21] There may be differences as to the facts: The showing of the color photographs would not be so close to trial. On the other hand, if the 1968 in-court identification was tainted, that—together with the 1968 color photograph presentation—might be found to affect any new in-court identification. The trial judge would be obligated to approach any determination on the issue of independent source only after careful examination of each of the proposed witnesses.

[continued]

if determinations as to independent source are based on careful analysis of the issues (see fns. 10 and 20), including findings as to suggestiveness or not, and careful examination of the proposed witnesses at a pre-trial hearing.

If a new trial is held, there would have to be a determination of appellant's claim that his constitutional right of speedy trial was violated by the delay between the April 1966 indictment and the May 8, 1969, trial. Although there appears to be considerable substance in the Government's claim that this was primarily due to appellant's own doings, including non-cooperation with defense counsel, in view of the skimpy record before us we conclude this issue should be left for further exploration by the trial judge if a new trial is sought.

We reverse and remand for further proceedings not inconsistent with this opinion.

So ordered.

BAZELON, *Chief Judge:* While I concur in the opinion of the Court in *Ash* in its statement of the principles calling for reversal of the conviction, I am of the view, for the reasons set forth in my opinion dissenting in *Brown*, and concurring in *Ash*, that logic and fairness require application of those principles to all persons in custody.

The opinion of Chief Judge BAZELON concurring in *United States v. Ash*, No. 22,340, and dissenting in the companion case of *United States v. Brown, Proctor & Williams*, No.

There may be a difference in the legal situation due to the subsequent enactment of 18 U.S.C. § 3502. We intend no comment either on the applicability vel non of this statute to a retrial following reversal of a conviction prior to its enactment, or to possible constitutional limitations on its application.

24,452, opinion filed today, is found at page 21 of *United States v. Brown, Proctor & Williams.*

WILKEY, *Circuit Judge*, dissenting: There are two major elements of Judge Leventhal's opinion for the majority which give rise to this dissent.

First, the Sixth Amendment rationale of *Wade*[1] does not apply to *Ash*, and the effort to rest the majority opinion on a faulty foundation has produced a distorted result almost unique among decided cases.

Second, Fifth Amendment principles applicable in this type case, recognized and established by decisions of the Supreme Court, our own and sister circuits, have not been correctly applied to the facts here.

I. *The Sixth Amendment Rationale of* WADE *Does Not Apply to* ASH

A. *The Display of Photographs to Witnesses by the Prosecutor in Preparation for Trial is Not a "Critical Stage of the Prosecution" Requiring the Presence of Defendant's Counsel*

As we noted in *United States v. Brown, Proctor and Williams*, No. 24,452, opinion filed this day, throughout part IV of the majority opinion in *Wade* there runs a two-factor rationale for the required presence of counsel at a lineup: (1) the possibility of suggestivity, which may be averted by the presence of defendant's counsel; and (2) the capability of reconstruction at trial, if dependent's counsel is present during the identification process.

The majority opinion here enumerates three principal "dangers of mistaken identification from uncounseled line-up identifications set forth in *Wade*," and concludes that these

are applicable in large measure to photographic as

[1] *United States v. Wade*, 388 U.S. 218, 228ff. (1967).

> well as corporeal identifications. These include, notably, [1] the possibilities of suggestive influence or mistake—particularly where witnesses had little or no opportunity for detailed observation during the crime; [2] the difficulty of reconstructing suggestivity—even greater when the defendant is not even present; [3] the tendency of a witness's identification, once given under these circumstances, to be frozen.[2]

Before turning to the great majority of cases in other circuits which disagree with this reasoning and result, it might be helpful to analyze Judge Leventhal's interpretation of the rationale of *Wade* and the three dangers of mistaken identification, as applied to photographs:

1. The "possibilities of suggestive influence or mistake" are present in any identification procedure. Furthermore, the viewing of *any* photograph of the accused at *any* time is likely to add an immeasurable quantum to the certainty of a witness's identification, but these trace residuals the Supreme Court seemed willing to accept as not "impermissibly suggestive." This possibility would apply equally to *pre*-arrest photo identification.

It is noteworthy that in *Wade*, where the Court remanded the case for a hearing as to whether the in-trial identification had an independent untainted origin, the Court, in describing the ways in which the independent recollection of the witness could be proved, listed "the identification by picture of the defendant prior to the lineup."[3] This is a plain inference that pre-trial photographic identification—without the presence of counsel—is an accepted investigatory or preparatory technique and is relevant proof of the validity of the in-trial identification.[4]

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[2] Judge Leventhal's majority opinion, at 15 (hereafter cited as "Majority Opinion").

[3] 388 U.S., at 241.

[4] See *Simmons* v. *United States*, 390 U.S. 377, 384 (1968),

Yet a contrary conclusion forms the basis of Judge Leventhal's opinion here. "The presentation of color photographs subsequent to arrest—indeed on the eve of trial—was like a lineup as being a critical stage of the prosecution, requiring presence of counsel for Ash, within the meaning of *Wade*."[5] His opinion goes on to recognize "[w]e are aware that a majority of the courts that have ruled on the question have held *Wade* inapplicable to photographic viewings and identification."[6] There are fundamental reasons why this should be so.

Aside from the ease of reconstructing a photographic identification (see I.B. and I.C. *infra*), a photographic identification lacks many of the elements of a lineup which caused the Supreme Court to characterize a lineup as a "confrontation" and a "critical stage of the prosecution." A lineup is a little drama, stretching over an appreciable span of time. The accused is there in the flesh, three-dimensional and always full-length. Further, he isn't merely there, he acts. He walks on stage, he blinks in the glare of lights, he turns and twists, often muttering

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discussed in fuller detail in II.A., *infra*. This court and the District Court have acted on this basis. Recently in *United States* v. *Garner* and *Parker*, 142 U.S. App. D.C. 15, 439 F.2d 525 (1970), *cert. den.*, 402 U.S. 930 (1971), where the trial court had relied on a pre-trial photographic identification as establishing an independent source for a courtroom identification, on the state of the record we remanded in order that the pre-lineup photo be identified and made part of the record, and for the District Judge to amplify or modify his finding thereon. We thus assumed as a matter of established law that a proper finding of a valid pre-trial photo identification is relevant support for the in-trial identification. So did the Second Circuit in *United States* v. *Bennett*, 409 F.2d 888, 900 (1969), in a case in which the defendant was already under arrest at the time of displaying the photographs.

[5] Majority Opinion, at 12.

[6] *Id.*, at 12.

asides to those sharing the spotlight. He can be required to utter significant words, to turn a profile or back, to walk back and forth, to doff one costume and don another. All the while the potentially identifying witness is watching, a prosecuting attorney and a police detective at his elbow, ready to record the witness' every word and reaction.[1]

Obviously the defendant's counsel ought to be present throughout the drama of the lineup, within earshot of the witness, likewise making notes, ready to object to anything which would unnaturally, and therefore unfairly, single out his client from among other suspects or plain "fillers" in the lineup. The witness at a lineup is usually nervous, afraid of being spotted by the perpetrator of the crime if he is there, and all too frequently incapable thereafter of recalling any of the significant details of the lineup which took place over a period of time.

Compare the atmosphere in which the witnesses in this case made their photo identification of Ash—and failed to identify co-defendant Bailey—in their customary places of business or homes. In such an atmosphere, a witness need focus at that time on one thing only, the photographs, and be able to recall only one additional thing, any hint of suggestion in the way the photos were displayed or in the conversation of the official conducting the interview. Both

[1] Because so much more takes place at a lineup than at a photographic identification, I disagree with the assertion of the majority that "the same may be said of the opportunity to examine the participants as to what went on in the course of the identification, whether at lineup or on photograph." (Majority opinion, at 15). The little drama of a lineup seems to me much more difficult of reconstruction by examination of participants than does the photographic identification. Thus I see a greater need for the participation of counsel in the case of the lineup than in the case of the photographic identification.

are easy of reconstruction afterwards, as in this case. The photos were preserved, the witness' recollections of the relatively brief circumstances of the interviews were thoroughly plumbed by defense counsel before and at trial.

This was no "confrontation" with Ash, this was no "critical stage of the prosecution" requiring the presence of his counsel, and requiring the reversal of Ash's conviction because his counsel was absent. Nor by any other criteria of *Wade* is this a "critical stage" of the prosecution; rather, it is fair to appraise the situation as one carrying "minimal risk that his counsel's absence at such stage[s] might derogate from his right to a fair trial."[8]

Gilbert v. *California*[9] is authority and provides the analogy for this position. There the police had secured handwriting samples from the accused, after arrest and in the absence of counsel, not yet appointed. The Court distinguished the lineup and the rationale of *Wade*:

> The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. Cf. *United States* v. *Wade, ante.* If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, "the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own

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[8] 388 U.S., at 228.

[9] 388 U.S. 263 (1967).

[handwriting] experts." *United States* v. *Wade*, *supra*, at 227-228.[10]

Pre-trial photographic and handwriting identifications are obviously subject to similar cross-examination by defense counsel at trial. The position of defense counsel in dealing with these two matters at trial is quite similar, and his position with regard to a lineup is quite different from either. I submit that the rationale applicable to Ash's photographs is the rationale of *Gilbert* re handwriting samples, not that of *Wade* re lineups.

That the pre-trial identification is provable and producible at trial Judge Leventhal takes as a reason for requiring a different rule from that applicable to other phases of a pre-trial interview.[11] True, such pre-trial identification can be offered as independent evidence—*but*, before it can be received, on request defendant's counsel must have the opportunity outside the presence of the jury for a searching cross-examination of all the prosecution's identification witnesses. He can explore not only all the details of the pre-trial photographic identification, but also the exact opportunity each witness had to observe at the scene of the crime, previous opportunities each witness may have had to see the accused, the description each witness gave the police at the time, and the current strength of each witness' capability of identifying the accused. In so doing competent defense counsel usually manages to extract every important detail of the crime which constitutes the prosecution's case in chief. Armed with this information, defense counsel at trial knows precisely where to attack the prosecution's evidence, where to press the cross-examination, where to tread lightly or not at all. In

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[10] *Id.*, at 267.

[11] Majority Opinion, at 16-17, citing *United States* v. *Kirby*, 138 U.S. App. D.C. 340, 342n., 427 F.2d 610, 612n. (1970).

regard to no other phase of the prosecution's case does the defense have these opportunities and advantages.

No better example of the advantage given defendant's counsel by such a pre-trial hearing could be found than this case of Ash and Bailey. The capacity of defense counsel to reconstruct every detail of the pre-trial photo identification has been proved beyond peradventure, and likewise the capacity of counsel to utilize other information obtained. Now to reverse the conviction of Ash because his counsel was not present at the prosecutor's interview with his witnesses the day before trial, at which time the photos were displayed, is to go far beyond *Wade* or any other decision, and is indeed to "blink at reality" in the administration of justice.

There are basic considerations stemming from the fundamental structure of our system of justice which preclude the adoption of any such broad rule to the effect that during his trial preparation a prosecutor may not show photographs to the witnesses in the absence of defense counsel. Our system of justice is an adversary system; with all of the constitutional safeguards granted defendants, it necessarily must be. The display of the photographs to the witnesses in *Ash* was part of counsel's testing their recollection of pertinent facts of the case before putting them on the stand for questioning. At this point there is no more opportunity for suggestion as to what the witness's testimony should be in regard to identification than there is on any other facts of the case to which the witness might testify. A witness' identification from a photograph carries less danger of improper suggestion than other types of testimony, because the photograph is a visible, producible record of at least part of the interview, as it was in this case. For centuries, prosecutors and defense counsel have had the opportunity in private pre-trial interviews with witnesses improperly to influence

their testimony. When that has been shown to have been done, the trial courts have known what to do about the matter, but no court has yet held that the preventive remedy for such a possibility of improper influence is to place opposing counsel at every interview with the witness.

The remedy prescribed by the Supreme Court in *Wade*, where defense counsel had not been present at the lineup, was to remand to the trial court to conduct a hearing to determine if the witness's in-court identification had an independent origin. That type hearing has already been held for Ash, and for this and other reasons fully analyzed under I.C. *infra*, the rationale of *Wade* does not apply to *Ash*.

2. Judge Leventhal's second danger, the "difficulty of reconstructing suggestivity," appears to me to be the overpowering reason for which the Supreme Court in *Wade* designated the lineup as a critical stage of the prosecution,[12] calling for the presence of defendant's counsel under the Sixth Amendment. It is undeniable that as compared with a lineup, the difficulty of reconstructing suggestivity in a photographic identification is much, much less. The record of this case amply so demonstrates, as is discussed in detail under parts I.B. and I.C. *infra*.

3. Judge Leventhal's third danger, "the tendency of a witness's identification, once given under these circumstances to be frozen" would be equally (or more) true in the *presence* of defendant's counsel. Furthermore, it would be true of all identification procedures, and as noted above,

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[12] Likewise, as under Judge Leventhal's first point, the same danger is present in a *pre*-arrest photographic identification as post-arrest. While the appointment of counsel is easier to arrange in the post-arrest situation, the Supreme Court in *Wade* did not seem to be concerned about any danger in pre- or post-arrest photographic identification. See text accompanying note 8, *supra*.

the Supreme Court manifested no concern over these trace residuals of strengthened identification."[13] I do not read *Wade* as resting on this third ground at all, and since the presence or absence of counsel would have no effect, I fail to see why it provides a Sixth Amendment rationale for reversing the conviction of Ash.

Turning now to the authorities, Judge Leventhal's majority opinion relies heavily on the Third Circuit's first decision in *United States* v. *Zeiler*,[14] and considers that "the precedents contrary to *Zeiler* are to some extent conclusionary, rather than analytical, and to some extent based on erroneous premises."[15] On the Sixth Amendment question involved in *Ash*, the popularity of conclusionary decisions among the United States Courts of Appeals and the state courts is impressive indeed. Decisions of the Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits have explicitly and unequivocally taken the position that *Wade* does *not* apply to photographic identifications which occur *after* arrest.[16] Forty-two federal judges have held that

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[13] *Wade*, *supra*, 388 U.S., at 241.

[14] 427 F.2d 1305 (3rd Cir. 1970) (hereafter, *Zeiler I*). See Majority Opinion, at 15ff.

[15] Majority Opinion, at 16.

[16] *Second Circuit*: *United States* v. *Bennett*, 409 F.2d 888, *cert. denied, sub nom. Jessup* v. *United States*, 396 U.S. 852 (1969); *United States* v. *Baker*, 419 F.2d 83 (1969); *United States* v. *Sanchez*, 422 F.2d 1198, 1200 (1970); *United States* v. *Roth*, 430 F.2d 1137 (1970), *cert. denied*, 400 U.S. 1021 (1971); *United States* v. *Fitzpatrick*, 437 F.2d 19, 25 (1970); *United States* v. *Mojica*, 442 F.2d 920, 921 (1971); *Fourth Circuit*: *United States* v. *Marson*, 408 F.2d 644 (1968); *United States* v. *Collins*, 416 F.2d 696 (1969); *United States* v. *Canty*, 430 F.2d 1332 (1970); *Fifth Circuit*: *United States* v. *Ballard*, 423 F.2d 127 (1970); *Sixth Circuit*: *United States* v. *Serio*, 440 F.2d 827 (1971); *Ninth Circuit*: *United States* v. *Sartain*, 422 F.2d 887 (1970); *United States* v. *Smith*, 423

Wade does not apply to photographic identification.[17] Only the Third Circuit has reached a decision to the contrary, subsequent to a decision in accord with the other

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F.2d 1290; *cert. denied*, 398 U.S. 930 (1970); *Allen* v. *Rhay*, 431 F.2d 1160, 1167 (1970); *United States* v. *Edwards*, 433 F.2d 357, 358 (1970); *United States* v. *Goetluck*, 433 F.2d 971 (1970); *United States* v. *Roustio*, 435 F.2d 923 (1970); *United States* v. *Williams*, 436 F.2d 1166, 1169 (1970); *United States* v. *Fowler*, 439 F.2d 133 (1971); *Tenth Circuits Rech* v. *United States*, 410 F.2d 1131, *cert. denied*, 396 U.S. 970 (1969); *United States* v. *Von Roeder*, 435 F.2d 1004, 1010 (1971).

The issue of whether defense counsel is required at *post*-arrest photographic identification does not seem to have yet arisen in the Seventh Circuit, but it has been held on the authority of *Simmons* v. *United States*, 390 U.S. 377 (1968), that the absence of counsel at a photographic identification when the accused is not yet in custody is no barrier to the reception of such identification in evidence at trial. *United States* v. *Robinson*, 406 F.2d 64 (7th Cir.), *cert. denied*, 395 U.S. 926 (1969).

[17] *Second Circuit*: Circuit Judges Anderson, Friendly, Lumbard, Smith, Kaufman, Feinberg, and Waterman, together with District Judges Frankel, Zampano, and Palmieri; *Fourth Circuit*: Circuit Judges Haynsworth, Bryan, and Butzner; *Fifth Circuit*: Circuit Judges Wisdom, Simpson and Clark; *Sixth Circuit*: Circuit Judges Peck, Brooks, and Kent. *Ninth Circuit*: Circuit Judges Hufstedler, Wright, Chambers, Browning, Barnes, Hamley and Carter, joined by Senior Circuit Judge Tuttle of the Fifth Circuit sitting by designation in *Smith, supra;* Circuit Judges Trask, Hamlin, Ely, Duniway, and Kilenny, joined by District Judge Taylor, sitting by designation in *Edwards, supra; Tenth Circuit*: Circuit Judges Pickett, Breitenstein, Hill, and Holloway, joined by Senior Circuit Judge Jones of the Fifth Circuit sitting by designation in *Rech, supra;* Circuit Judge Seth, joined by District Judge Templar sitting by designation in *Von Roeder, supra; Eastern District of Pennsylvania*: District Judge Masterson; *District of Arizona*: District Judge Craig.

circuits,[18] and followed by a decision in the same case demonstrating that the real concern is not the right to counsel but the possibility of suggestiveness.[19]

Virtually all of those state courts which have had occasion to consider *Wade* have likewise rejected its application to photographic identification. California,[20] Illinois,[21]

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[18] In two other circuits, the First and Eighth, the issue of the applicability of *Wade* to photographic identification was raised but not decided. *United States* v. *Butler*, 426 F.2d 1275 (1st Cir. 1970), held that the in-court identifications were independently based, and therefore it was unnecessary to reach the Sixth Amendment *Wade* argument. In *United States* v. *Valez*, 431 F.2d 622 (8th Cir. 1970), the court remanded for a plenary hearing on all the circumstances of the lineup, whether counsel was present, and whether the witness had an independent source for in-court identification. The court also footnoted the evidence of pre-lineup photographic identifications, remarking without indicating a preference for the divergent views on the required presence of counsel at post-custody photographic identifications, citing *Zeiler I* for one view and three cases from the Second, Fifth, and Tenth Circuits for the contrary view.

[19] *United States* v. *Zeiler*, 447 F.2d 993 (3d Cir., 1971) (hereafter, *Zeiler II*).

[20] *People* v. *Lawrence*, 93 Cal. Rptr. 204, 481 P.2d 212 (Cal. Sup. Ct. 1971); *People* v. *Stuller*, 10 Cal. App.3d 582, 89 Cal. Rptr. 158 (1970); *People* v. *Wesley*, 10 Cal. App.3d 902, 89 Cal. Rptr. 377 (1970); cf. *People* v. *Williams*, 6 Cal. App.3d 752, 86 Cal. Rptr. 379 (1970).

[21] *People* v. *Martin*, 47 Ill.2d 331, 265 N.E.2d 685, 688 (1970); *People* v. *Holiday*, 47 Ill.2d 300, 265 N.E.2d 634, 637 (1970).

Maryland,[22] Mississippi,[23] North Carolina,[24] Washington,[25] Wisconsin,[26] Delaware, Massachusetts, and Florida[27] have all held that the rationale of *Wade* only applies where a defendant is present and is confronted by a witness. Pennsylvania,[28] influenced by the Third Circuit, (and possibly Nevada)[29] alone illuminates the path the majority takes here.

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[22] *Smith and Samuels* v. *State*, 6 Md. App. 59 (1969); *Johnson* v. *State*, 9 Md. App. 327, 264 A.2d 280 (1970); *Crenshaw* v. *State*, —— Md. App. —— (Court of Special Appeals No. 131, 12 November 1971).

[23] *Stevenson* v. *Mississippi*, 244 So.2d 80, 33 (Miss. 1971).

[24] *State* v. *Accor*, 276 N.C. 65, 175 S.E.2d 583, 592-593 (1970).

[25] *Washington* v. *Searcy*, 4 Wash. App. 860, 484 P.2d 417, 419-420 (1971).

[26] *Kain* v. *State*, 48 Wis.2d 71, 179 N.W.2d 777, 782 (1970).

[27] *Reed* v. *Delaware*, 281 A.2d 142 (Del. Sup. Ct. 1971); *Commonwealth* v. *Geraway*, 355 Mass. 433, 245 N.E.2d 423, 427-428 (1969); *Staten* v. *State*, 248 So.2d 697 (Fla. 1971). *See also McClain* v. *State*, 444 S.W.2d 99, 102-104 (Ark. 1969); *but see Cox* v. *State*, 219 So.2d 762, 765 (Fla. App. 1969); *People* v. *Rowell*, 14 Mich. App. 190, 165 N.W.2d 423, 426 (1968) (concurring opinion).

[28] *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A.2d 738, *cert. denied*, 39 U.S.L.W. 3214 (1970).

[29] *Thompson* v. *State*, 451 P.2d 704, 706 (Sup. Ct. Nev. 1969); *Carmichael* v. *State*, 647 P.2d 108 (Sup. Ct. Nev. 1970).

We do not think that the Nevada Supreme Court holdings support the rule enunciated by the majority here. In both *Thompson* v. *State*, 451 P.2d 704 (1969) and *Charmichael* v. *State*, 647 P.2d 108 (1970), after due notice was taken of the constitutional requirements, the errors, if any, were held harmless and the convictions affirmed. In *Thompson* the Nevada Supreme Court registered a view completely consistent with this writer's dissent in the case at bar:

In one of the earlier circuit decisions after *Wade*, Judge Friendly correctly appraised the limits of *Wade*: "... to require that defendant's counsel be allowed or appointed to attend out-of-court proceedings where the defendant himself is not present would press the Sixth Amendment beyond any previous boundary."[39] In *United States* v. *Cunningham*[40] a witness at a lineup was interrogated outside the presence of both the accused and his counsel as to the witness's identification. The Fourth Cir-

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We would not require counsel at photographic identification proceedings while the suspect is in custody if local law enforcement authorities would but preserve competently in the legal sense the photographs that are displayed to witnesses, provide guidelines for proper photographic identification procedures, and follow these guidelines. If the pictures are preserved and presented in court at subsequent proceedings with the same foundation as other similar evidence, defense counsel will be able to intelligently cross-examine the witnesses at trial. The guidelines would provide against improper suggestion which could not be cured by cross-examination.

In this case no one was sure that the photographs, other than appellant's, were the same photographs which were used at the pretrial identification. The difficulties of cross-examination and the possibilities of irreparable suggestion are apparent.

451 P.2d at 707.

[39] *United States* v. *Bennett*, 409 F.2d 888, 899 (2nd Cir. 1969). In considering Judge Friendly's view in *Bennett*, Judge Leventhal seems to consider that other possible forms of prejudice were recognized in *Wade* and required counsel to be present. Majority Opinion, at 16. The need for protection by the presence of counsel is largely dissipated if the circumstances of the identification can be reconstructed. As amply demonstrated in I.B. and I.C., *infra*, this was well done in the case at bar, and it was the impossibility of so doing in *Wade* that principally concerned the Supreme Court.

[40] 428 F.2d 1269 (4th Cir. 1970).

cuit held this procedure entirely proper, Judge Winter saying:

> Here, the lineup was terminated and witnesses were being interrogated outside of the presence of suspects. Confrontation had occurred and was terminated. By the rationale of *Wade* and *Gilbert*, counsel was no longer required unless we were prepared to hold that defense counsel must be present whenever the Government interrogates a witness whose testimony may be used as part of the government's case at trial.[22]

The Supreme Court of California recently differentiated "confrontation," as the United States Supreme Court has used the term, from photographic identifications, in a case in which defendant's counsel was not present either at the showing of the photograph or the lineup:

> In *Wade*, *Gilbert*, and *Stovall*, the police exhibited the accused to witnesses in person. At such corporeal exhibitions . . . [t]he witness observes the suspect in person from a short distance performing the very acts the criminal did during the perpetration of the crime. At photographic identification proceedings, however, the accused is not present and the witness observes only static poses of those pictured. . . . We conclude, therefore, that the showing of photographs of the accused to a witness is not a confrontation or exhibition as those words are used in *Wade* and *Gilbert*. . . .[23]

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[22] *Id.*, at 1274.

[23] *People* v. *Lawrence*, 93 Cal. Rptr. 204, 207, 481 P.2d 212, 215 (Cal. Sup. Ct. 1971). The three dissenting justices did so on grounds not applicable here.

> First, the record clearly demonstrates that the photographic identification procedure in question was undertaken with the conscious purpose of evading the requirements of *Wade* and *Gilbert*. . . . Second, . . . it is improper to resort to photographic identification procedures after arrest when, as in the instant case, the authorities have failed to demonstrate the need to utilize

While the Third Circuit's decision in *Zeiler I*, *supra*, out of the innumerable decisions on identification subsequent to *Wade*, is the *only* U.S. court decision reaching the same result on a rationale similar to the majority's here, I suggest even the majority's reliance on *Zeiler I* may be misplaced. While Judge Leventhal apparently deems *Zeiler I* more analytical [34] than the other circuit and state decisions, the analysis in *Zeiler I* was not sufficiently detailed to mention the same circuit's year-previous decision in *United States* v. *Conway* [35] reaching a contrary result. Hence there is no explanation by the court of the differing results in the two cases. Judge Leventhal implies that

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such an inherently less reliable method rather than a corporeal lineup with full constitutional protections. *Id.*, at 209, 481 P.2d at 217.

[34] For an opinion in accord with *Zeiler I* which I submit could quite properly be classified as "conclusionary," *see Reed* v. *Anderson*, 9 July 1971, U.S. District Court, Delaware, Habeas Corpus No. 140, 9 CrL 2323. Reed came before the District Court after the Delaware Supreme Court had affirmed Reed's conviction, the latter court ignoring the Third Circuit's holding in *Zeiler I*, *supra*, and declining to extend the *Wade* rule to a witness' out-of-court examination and identification of photographs of the accused. *Reed* v. *State of Delaware*, —— A.2d —— (Del. Sup. Ct. 1971). The Delaware Supreme Court had aligned itself with what the U.S. District Court termed a "rather one-sided split of authority" that there is no right to counsel at a post-arrest showing of photos at which the defendant is not present. *Reed* v. *Anderson*, *supra*, Mimeograph Opinion, at 10, 9 CrL, at 2324. However, the U.S. District Court (before *Zeiler II*) found itself compelled to grant habeas corpus relief to Reed under the Third Circuit's holding in *Zeiler I*. In so doing, however, the U.S. District Court gave strong hints that its conclusion was compelled by *Zeiler I* and that its own unrestricted analysis might have reached a different result, on the strong side of the "rather one-sided split of authority."

[35] 415 F.2d 158 (3rd Cir. 1969).

Zeiler I was so decided because the identification was post-arrest. In *Conway* the photographic identification was *post*-arrest, pre-indictment, apparently counsel had not been assigned, and no lineup was ever held.[26] The Third Circuit held the presence of counsel was not required by the Sixth Amendment as interpreted by *Wade*, nor was there any Fifth Amendment violation under *Simmons* and *Stovall*. In *Zeiler I* the photographic identification was also post-arrest, also pre-indictment, but counsel had been appointed, and a lineup had been definitely scheduled. The last factor loomed large in the Third Circuit's rationale.

> A witness once induced by such a suggestive confrontation into making a mistaken identification is extremely unlikely later to change his mind. . . . The constitutional safeguards that *Wade* guaranteed for lineups may be completely nullified if the police are able privately to confront witnesses *prior to the lineup* with suggestive photographs.[27]

The facts of *Ash* are quite different. Ash was arrested a year and a half before *Wade* was decided. No lineup was ever scheduled. *There is yet no court decision holding a lineup is constitutionally required.* The display of the photographs giving rise to the majority's reversal of this case occurred solely in the course of the prosecuting attorney's normal preparation for trial in interviewing his witnesses. There is no contention whatsoever in the case at bar that the prosecuting attorney, the FBI, or the police sought to avoid any constitutional requirement.

It will not do to dismiss this impressively long list of decisions, this "one-sided split of authority," holding squarely that the requirement of counsel at a lineup in *Wade* does ~~not extend~~

[26] 415 F.2d at 162-163.

[27] 427 F.2d at 1306-07 (emphasis supplied). *Cf.* the reason advanced by the three dissenting judges in *People* v. *Lawrence*, *supra*, n. 33, where the record clearly showed an intent to evade the requirements of *Wade*.

not apply to post-arrest photographic identifications, with any deprecatingly descriptive adjectives. While "weight of authority" may be sometimes a slippery rock on which to stand, and while courts must give heed to the better reasoned cases, nevertheless, one decision in the Third Circuit at Philadelphia, followed in the Pennsylvania court at Harrisburg, preceded by an as yet unreconciled decision in the same Circuit, and followed by another decision in the same case reaching a contrary ultimate result, is hardly enough to weigh against the multitude of decisions elsewhere. Too many courts, too many judges, federal and state, have held that *Wade* does not apply in situations comparable to that of the case at bar for this court to ignore what is now the established interpretation of *Wade*. For an obvious related reason, the task of analyzing the non-application of *Wade* in the vari-hued fact situations represented in this multitude of decisions is more wisely done by considering the rationale of *Wade* itself applied to *Ash*, as is done in Part I.C. *infra*.

B. *The Majority Opinion's fully developed analysis of the alleged Fifth Amendment violation proves the absence of a Sixth Amendment violation.*

An inherent refutation to the validity of the majority opinion on the Sixth Amendment right to counsel (Part III) is found in the preceding portion (Part II) of Judge Leventhal's opinion dealing with Fifth Amendment due process violations. As noted, along with the prevention of possible suggestivity, the *Wade* rationale for requiring the presence of counsel rests primarily on the inability to reconstruct at trial any suggestivity unless defendant's counsel was present at the lineup.[24] The fact that Judge Leventhal is able to write an opinion developing so fully and in such detail alleged violations of due process establishes that the presence of counsel at the photographic identification

[24] See I.A., *supra*.

would have been of no additional value, and therefore the Sixth Amendment ground of the opinion, the one relied on for reversal, is not valid. The rationale of *Wade* simply does not logically cover the *Ash* situation.

Judge Leventhal is able to write an opinion developing the alleged violations of due process, in spite of the absence of counsel at the photographic exhibition, because the circumstances surrounding photographic identification by a witness *do* have the capacity to be preserved for examination at trial and on appeal. What would have been added by the presence of counsel? Suppose the defendant's counsel had found the photographs unfair in comparison and therefore suggestive to the witnesses? Would he have been able to do any more at the pre-trial hearing, or at the trial itself, or on this appeal, if he had been there? The examination of the photographs themselves, cross-examination by counsel at the pre-trial hearing, additional examination at trial with the benefit of the pre-trial hearing outside the presence of the jury—all of this enabled the two defendants' counsel to bring out every facet of possible violation of due process.

I submit that a photographic exhibition to a witness in the absence of the defendant is simply not a critical stage at which defense counsel's presence is or should be required by the rationale of *Wade*. Nothing better proves this non-critical character of this stage of the prosecution's preparation than the explicit detail of Part II of the majority opinion dealing with the alleged Fifth Amendment due process violations.

C. *The Sixth Amendment right to counsel in relation to photographic and in-court identification.*

1. *Analysis of Wade*

Here it is necessary to take a close look at the ultimate

evil the Court was seeking to prevent or cure in *Wade*. The ultimate evil is infusing a taint in a witness' testimony by a suggestive lineup, substituting for the eyewitness' recollection of the offender the image of the accused derived from an improper lineup or other identification procedure. It is not the absence of defendant's counsel which is capable of producing tainted testimony either of the lineup identification itself or in court later, only a suggestive improper lineup or other identification procedure may color the witness' testimony. The presence of counsel at the lineup may or may not have the effect of removing suggestive features (the police are under no obligation to accept the criticisms of defendant's counsel), but counsel's presence does enable him intelligently to attack both the in-court and the pre-trial lineup identification if offered. *This is what had been denied Wade's counsel.*

Presented with the situation in *Wade*, where not only had defendant's counsel not been present at the lineup but the trial court had not conducted a pre-trial hearing to determine if the lineup had been suggestive and, if so, if the eyewitnesses had an independent origin which could validate their identifications; assuming because of the absence of counsel that the lineup had been improperly suggestive, the Supreme Court remanded for such a hearing. The Court did not remand for another lineup at which counsel should be present, but remanded to determine independent origin, because the ultimate evil with which the Court was concerned was altered testimony. The Court found the denial of a right to counsel at the lineup a violation of the Sixth Amendment, but this violation itself would not be a producing cause of colored testimony. The producing cause of altered testimony *could be* a suggestive lineup or other improper identification procedures, hence the "cure" was for the trial court to hold a hearing to ascertain if, assuming because of the absence of counsel that the lineup had

been improperly suggestive, the witnesses had an independent origin for their in-court testimony.[39]

In summary, the rationale of the *Wade-Stovall-Gilbert* trilogy is that the producing cause of altered testimony of an eye-witness is a suggestive lineup or other improper identification procedure. But where the circumstances of the identification procedure are simple of reconstruction, as is the case with a photographic identification, there is no need for counsel's presence, and the pre-trial hearing at which defense counsel can fully explore all avenues is sufficient to equip counsel to protect his client at trial. Even in *Wade*, where no counsel was present at the lineup (described as a "critical" stage of the prosecution) the trial court was instructed to reinstate the judgment of conviction if the trial court found an independent origin to validate the witnesses' testimony. The evil the Court sought to exorcise was altered testimony; in regard to this the absence or presence of counsel was neither cause nor cure.

Taking the foregoing into account, it is important to distinguish between Fifth and Sixth Amendment violations and the resulting questions raised in regard to identifications. If the allegation is a Fifth Amendment due process violation because of a suggestive identification procedure, the inquiry at any hearing on the allegation is, first, whether the identification procedure was in fact impermissibly suggestive, and if it was, then second, whether the prosecution can overcome this by showing an independent origin from which the witness *could* have made an identification without the improper suggestion.[40] If the

[39] 388 U.S., at 241-242.

[40] *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237 (1968, *en banc*). See also *Simmons* v. *United States*, 390 U.S. 377, 383, 384, upon which this court relied in determining the standard set forth in *Clemons*. 133 U.S. App. D.C., at 32-33, 408 F.2d 1235-1236.

allegation is a Sixth Amendment violation because of a denial of defendant's right to counsel, the question is first whether defendant was denied counsel's presence at a critical stage of the prosecution. In *Wade* the Supreme Court held that a lineup was a critical stage of the prosecution, and that answered Question One. Logically Question Two would seem to be whether the lineup was impermissibly suggestive so as to bar in-trial identification (no evidence of lineup identification was offered in *Wade*), but the Supreme Court considered at length the handicaps defendant's counsel would be under in establishing all the circumstances of a lineup, and apparently *assumed*, because of the absence of counsel at this critical stage, that the lineup was unfair and suggestive. It then proceeded to another question, the same as the second question involved in a Fifth Amendment inquiry, to wit, whether the prosecution could show an independent origin. If it could, then notwithstanding the Sixth Amendment violation, Wade's conviction would be reinstated.

Note that in each example, Fifth or Sixth Amendment violation, the trial court hearing is to determine whether the prosecution can show independent origin of identification. If a due process violation is alleged, then defendant must establish the suggestiveness before requiring the prosecution to overcome it. If a denial of counsel at a critical stage is alleged—and proved—then the suggestiveness is *assumed* and the prosecution is put to its proof of independent origin, because once the denial of counsel at a critical stage of the prosecution is established, the inability of defendant's counsel to prove suggestiveness is recognized.

2. *Wade applied to Ash*

What the Supreme Court recognized as true in *Wade*, where defendant's counsel was absent from a lineup, has been decisively refuted in *Ash*, where counsel was absent

only from a display of photographs.[41] We are not forced to assume, because of counsel's inability to reconstruct the circumstances of the identification, as the Court did in *Wade*, that the identification procedure was suggestive, and thus remand for the trial court to explore independent origin. We already know, from defense counsel's able use at the trial of all the circumstances brought out in detail at the pre-trial hearing, the full extent of any suggestiveness and the independent origin of the witnesses' identifications.

Co-defendant Bailey's counsel brought out and dwelt upon the witnesses' prior identifications—or lack of them—and Bailey was acquitted. Ash's counsel had been forewarned by the pre-trial hearing, and could skip or dwell where he wished in the witnesses' recollection.

What makes *Wade* a Sixth Amendment right case—and why *Ash* is not—is that Wade was deprived of his counsel's presence at a time and place where it counted—the lineup. The lineup is truly a "critical stage" of the prosecution at which the Sixth Amendment requires counsel, as demonstrated by the handicaps under which Wade's counsel labored at trial. Not so with appellant Ash. He had no counsel present—neither was Ash—when the prosecuting attorney was displaying photographs to government witnesses in preparation for trial. But at trial his counsel was under no handicap in his defense, for two reasons: (1) the inherently different nature of a photographic identification from a lineup,[42] and (2) the full pre-trial due process hearing at which defense counsel familiarized himself thoroughly with the preceding events and anticipated testimony.

What the Supreme Court directed to be done in *Wade*

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[41] See *supra*, Part I.B.

[42] See text accompanying notes 7-8, *supra*.

has already been done in *Ash*. Not only has it been done by the trial court, but, most important, both defendants' trial counsel utilized to the fullest extent at the trial the weaknesses in the four witnesses' identifications uncovered at the pre-trial hearing.[43] There was the fullest exploitation of the circumstances of the pre-trial photo identification and the pre-trial hearing—reflected in Part II of the majority opinion here. Ash's trial counsel was far from the situation described by the Supreme Court:

> . . . the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification.[44]

To prove the inappositeness of the *Wade* rationale and procedure to the case at bar, consider how altered the Supreme Court's opinion in *Wade* would necessarily have been if there had already been a trial court hearing on independent source, such as Judge Gasch conducted here, when the case reached the Supreme Court.[45] Even if

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[43] See text following note 41, *supra*.

[44] *United States* v. *Wade*, 388 U.S. 218, 240-41.

[45] Would the Court have dwelt at length on the Sixth Amendment right to counsel at the lineup and the handicaps defendant's counsel labored under at the trial because of his unfamiliarity with the strengths and weaknesses of the government identification evidence? I submit that it is clear the Court would not have written such an opinion. If there had been a trial court hearing at which defendant's counsel could have probed the circumstances of the lineup, and the trial court could have ruled on whether there was suggestiveness in the identification procedure and if so whether there was an independent origin, then the question of counsel's presence or absence at the lineup would have become de-

the Supreme Court had desired to lay down a rule requiring defendant's counsel's presence at all lineups, it would not have vacated the conviction on the basis of any Sixth Amendment denial of right to counsel, because this would have already been rendered moot by the trial court hearing and could not have been decisive. Even in *Wade*, the Supreme Court recognized the ultimate undecisiveness of the Sixth Amendment violation by saying the District Court could reinstate the conviction, if the hearing showed an independent origin for the identifications."[46]

This is precisely what the Third Circuit did in *Zeiler II*, *supra*, note 19. Since the record of the trial resulting in two convictions "did not indicate what photographs were shown to the identifying witness in the absence of Zeiler's counsel," these two convictions were "remanded for a pre-trial hearing in order to afford the Government an opportunity to prove 'by clear and convincing evidence' that its witnesses were not so influenced by the prior photographic confrontations as to be incompetent to make in-court identifications."[47] On remand the District Court ruled all witnesses who had been shown photographs outside the presence of defendant's attorney were incompetent to testify on retrial. The Third Circuit (in *Zeiler II*) reversed again, holding (1) the photographs and the procedure followed in exhibiting them were not unduly suggestive, and (2) the Government had brought out substantial evidence "that the in-court identifications at the first trial were of independent origin."[48]

~~The very~~ elderly subsidiary. The controlling issue would necessarily have been the adequacy of the trial court hearing on suggestiveness and independent origin.

[46] 388 U.S., at 241-242.

[47] *Zeiler II*, 447 F.2d, at 994.

[48] *Id.*, at 996.

Zeiler still has not had his counsel present at any prosecution exhibit of photographs to these witnesses, but when he is retried, all witnesses will be permitted to make an in-court identification. The applicability to *Ash* is, of course, that *Zeiler I* and *Zeiler II* hold that once the trial court makes a reviewable ruling on the question of suggestiveness and independent origin, the absence of counsel the majority here think is required by the Sixth Amendment is utterly immaterial.

What the Supreme Court found *undecisive* as to the ultimate result for *Wade* is likewise *undecisive* for *Ash*. And the trial court hearing, which the Supreme Court ordered in *Wade* and whose result *was* to be decisive for *Wade*, has already been had for *Ash*. *Zeiler II* confirms completely this analysis. The issues decisive of this case therefore turn on the content of that pre-trial hearing of Judge Gasch, i.e., the presence of any suggestiveness in the photographic exhibition and the existence of an independent origin for the eyewitnesses' testimony.

If this analysis is correct, then Part III of Judge Leventhal's majority opinion, developing a Sixth Amendment rationale for reversal and extrapolating therefrom a rule for future police conduct, is beside the point. The relevant portion is Part II, dealing with Fifth Amendment questions of possible suggestivity and independent origin. Yet the majority specifically rejects this as the basis for its decision. "But we do not remand for this purpose [a more thorough hearing on impermissible suggestiveness] because there is another objection to the photographic identification that establishes the need for reversal. . . . We do not find it necessary to determine whether appellant's Fifth Amendment rights were violated because the color photographs were impermissibly suggestive. In the circumstances of this case, defendant's constitutional right to counsel at critical stages of the

prosecution was violated. . . ." (Majority Opinion, at 11) So one thing is clear: the majority position stands or falls on the validity of its reasoning on the Sixth Amendment ground of a purported denial of counsel, *not* on the Fifth Amendment ground.

3. *The deterrence rationale of Wade on pre-trial identification is missing from Ash.*

We now come to the precise rule the majority seeks to promulgate in the case at bar:

> We conclude that the sound rule prescribes that in general, subject to certain exceptions, *Wade* and its requirement of presence of counsel, are applicable to a Government exhibition of photographs of a person in custody for an offense to witnesses called to identify the person who committed the offense. (P. 14)
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>
> We do not consider in this opinion whether or to what extent its principle should be applicable in case of a photographic showing subsequent to a lineup. (P. 22)

Whatever the merits of this rule in the abstract, no weaker vehicle could be found for its launching than the case of Ash.

Analysis of the rule, its foundation, and its logical applicability to the situation here, with respect to both pre-trial and in-trial identifications, shows why.

The action of the majority is unsupported by the rationale of *Wade* in regard to *pre-trial* photographic (or lineup) identifications. The Court's (Justice Brennan's) opinion in *Wade* implied that the deterrent effect of the exclusionary rule would be the rationale for barring testimony of pre-trial identifications at which defendant's counsel had not been present.[49] This the Court made explicit in *Gilbert* v. *California*:

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[49] "Where, as here, the admissibility of evidence of the

> Only a *per se* exclusionary rule as to such testimony [that they identified Gilbert at the lineup] can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the initial lineup. *In the absence of legislative regulations adequate to avoid the hazards to a fair trial* which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence.[50]

As the majority opinion itself states, the District of Columbia police have subsequently promulgated rules requiring every defendant to be placed in a lineup with his counsel present immediately after arrest—in some cases *before* arrest—for identification. To reverse Ash's conviction because of, or to bar the use of, the pre-trial photo identifications on the Sixth Amendment ground of counsel not being present would be to apply a *per se* exclusionary

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lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified. See *Nardone* v. *United States*, 308 U.S. 338, 341." 388 U.S., at 240. The Court added, in a footnote, "We reach a contrary conclusion in *Gilbert* v. *California* [388 U.S. 263] as to the admissibility of the witness' testimony that he also identified the accused at the lineup." 388 U.S., at 240n.

[50] 388 U.S. 263, 273 (emphasis supplied). The rationale of the exclusionary rule is thus its purported deterrent effect, which has no applicability to the facts of *Ash*. Ash was arrested in early 1966, *Wade* was decided a year and a half later, the police were not on notice until then that the most approved technique would be to put Ash in a lineup with his counsel present. The photographic display to the witnesses the day before and on the day of trial in May 1968 was not intended to be the equivalent of a lineup (it was merely part of the prosecutor's pre-trial preparation), and neither *Wade*, *Gilbert*, nor any subsequent case had held that the *Wade* rationale for right to counsel applied to photographic identification.

rule *where it could not possibly have a deterrent effect.* As *Gilbert* made clear, it is only "[i]n the absence of legislative regulations [when] . . . the desirability of deterring . . . must prevail over the undesirability of excluding relevant evidence."[51] We now have the "legislative regulations adequate to avoid the hazards to a fair trial." As of December 1971, since the Metropolitan Police Department drew up uniform procedures for conducting police lineups, there has not been a single case dismissed for improper or suggestive lineup identification.[52] The police rules themselves thus prohibit a repetition of the peculiar circumstances of this case. Should such circumstances again occur, then it will be logical to apply such a *per se* exclusionary rule.

4. The rationale of Wade on in-court identification is likewise missing from Ash.

It is even more certain that the Sixth Amendment right to counsel in May 1968 has no relevance whatsoever to the *in-court* identifications by the witnesses on retrial of this case, which necessarily will be almost four years after the photographic identifications complained of. As emphasized above, Judge Leventhal's opinion makes clear that the ground of reversal here is a Sixth Amendment right of which the defendant was deprived,[53] so what relevance does the presence or absence of defendant's counsel at the photographic identification in May 1968 have to the witnesses' possible identification of the accused in court in early 1972?

Again the majority opinion is contrary to the Sixth

[51] 388 U.S., at 273.

[52] M. E. Pitts (Deputy Chief, Metropolitan Police Department, Washington, D.C.), "How Sound Is Your Police Lineup," *FBI Law Enforcement Bulletin* (December 1971).

[53] Majority Opinion, Part III.

Amendment rationale of *Wade*. There the Supreme Court pointed out that an exclusionary rule which concerned only the lineup evidence "without regard to admissibility of the courtroom identification, would render the right to counsel an empty one." [54] The Court stressed that "counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well," since "[t]he lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for further reference." [55] The crystallized identification might then carry over to taint the witness' identification at trial.

The remedy for this, said the Court, is to permit the defense to attack the proffered in-court identification, but *not* to invoke any *per se* exclusionary rule which might be justified in regard to a pre-trial identification which was either unfair or from which defendant's counsel had been absent. Rather, the Government should have an opportunity to show that its identifications have "'been come at . . . by means sufficiently distinguishable to be purged of the primary taint'", [56] *i.e.*, the familiar "independent origin."

So in *Wade* the case was remanded for such determination *because* ". . . whether the in-court identifications had an independent origin . . . was not an issue at trial." [57] Depending on the outcome of the hearing on independent source, the District Court was "to reinstate the conviction or order a new trial, as may be proper." [58] In the case of Ash the District Court *has already held this hearing and*

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[54] 388 U.S., at 240.

[55] *Ibid.*

[56] 388 U.S., at 241.

[57] 388 U.S., at 242.

[58] *Ibid.*

determined independent origin, after both defense counsel had been given every opportunity to attack the proffered in-court identification.

II. *Due Process Under the Fifth Amendment*

A. *The Evidence and Its Development*

In *Simmons* v. *United States* the Supreme Court, speaking unanimously on this point, laid down the standard for resolving questions arising from initial identification by photograph in these terms:

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. *We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts*, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground *only* if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. [Emphasis supplied.] [1]

Both at the pre-trial hearing, at which the trial judge ruled that the witnesses could make in-court identifications,[2] and at the trial itself the four eyewitnesses testi-

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[1] 390 U.S. 377, 384 (1968).

[2] From reading the opinion of the majority one might be left with the impression that only *one* of the eyewitnesses testified at the pre-trial hearing. See Majority Opinion, at 5.

fied frankly that they were not certain of their identifications of the accused. In light of the Supreme Court standard the exact degree of identification established by each witness is of considerable importance, hence it is set forth in pertinent detail below.[61] The witness who had been out-

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Perhaps this partially explains my difference with the majority as to the foundation for the independent source determination, since I am taking into account *both* of the witnesses who testified at that hearing, Mrs. Paugh and Mrs. Apple (See Transcript, pp. 88-102, for the testimony of Mrs. Paugh; and Transcript pp. 122-134 for the testimony—at the hearing—of Mrs. Apple). As I will elaborate *infra*, I conclude that there was quite sufficient support for the finding of independent source, not the smallest part of which was the testimony of the *two* eyewitnesses.

[61] A. Mrs. Paugh, one of the tellers, testified at trial:

Q. . . . Just look around and tell us if that man is here?

A. I cannot be sure if he is here.

Q. Can you identify that man who walked in the bank, the man you described?

A. Not definitely.

* * * *

Q. Mrs. Paugh, the question was, I want you to look around the Courtroom and tell us whether or not you can make any kind of identification of the man who waved the gun around in the bank?

A. I can make no definite identification.

Q. You stated that.

A. Other than the fact there is a young man that is here that looks similar to the one in the lobby.

Q. Would you kindly point out that person?

A. This young man right here at the end of the table (indicating Ash).

* * * *

Q. . . . I am sorry, did you give your best estimate of the time of this robbery, from the time you first noticed that person?

side in the automobile and had the opportunity to see both men fleeing without a mask on was the most firm in her identification. Neither of the four witnesses was ques-

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A. I would say approximately three minutes.

Q. During that three minutes, what were you doing?

A. I was sitting there petrified.

* * * *

Q. What portion of those three minutes, after you first noticed the gentleman you mentioned, after you first noticed him, what portion of any of those three minutes did you look at him?

A. Well, I would say constantly, because I didn't look at the young man on the right who was taking the money.

At the pre-trial hearing, Mrs. Paugh had testified:

Q. Now, did these—isn't it a fact these photographs that you saw yesterday recreated in your mind the impression that you had or created in your mind an appearance of the person you might have seen at the time of the offense?

A. No, not really. They were a collection of photos like the first ones, some were short and tall and varying in sizes. I mean, they didn't leave me with an impression on me, really.

* * * *

Q. Did these photographs in any way refresh your recollection or recreate in your mind an image of the person or a person that you saw or might have seen at the time of the offense?

A. No, sir, they did not.

B. The other teller, Mrs. Major, testified at trial:

Q. . . . From the time you first noticed that first man, the man with the gun, until the two men left the bank, what portion, if any, of that time did you look at that first man?

A. Most all the time.

Q. Now, I want you to look around the Courtroom,

tioned by the prosecutor concerning the previous photographic identifications of the appellant, although counsel for defendant Bailey brought out from one witness that

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Mrs. Major, and tell us whether or not that man that you described is or is not present in this Courtroom?

A. I believe he is.

Q. Would you kindly state who it is?

A. It is this gentleman, the first one (indicating Ash).

* * * *

Q. All right. Are you prepared to tell us with absolute certainty that is the same man, the man you saw in the bank that day is the same man you pointed out today?

A. I cannot say with absolute certainty, no.

Q. You have some doubt in your mind?

A. I have no doubt in my mind, but I cannot say with absolute certainty.

She was not called for the pre-trial hearing.

C. The depositor, Mr. Taylor, testified at trial:

A. I was talking to Mr. Burton who is one of the tellers and in the course of our conversation, the door opened, I glanced to my left and saw a man come in and then we resumed our conversation.

Momentarily, thereafter, he, the man, said, "Don't move, this is a holdup."

A. The gentleman moved around in the bank and—he left out and appeared to drop a bullet, I heard an object fall on the floor, and I saw him reach down, just out of the corner of my eye.

* * * *

Q. For how long a period of time did you look at this person?

A. Just a matter of seconds.

* * * *

Q. And in terms of inches or feet, how far away were you from him?

A. Very close. I guess about maybe from—about that distance (indicating).

she had been unable the day before to identify Bailey's picture in the group of five. After colloquy at the bench, all parties, including appellant's own trial counsel, then

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Q. All right. Would you look around the Courtroom, Mr. Taylor, and tell us whether or not the person you described is present in this Courtroom?

A. The first man on the end looks sort of like the man that I saw coming in (Ash).

* * * *

Q. All right. When you turned as you described, as you looked at the man, did you see his full face?

A. When was that? You mean when he first came in?

Q. First off, when he first came in?

A. When he first came in, yes.

Q. You were able to make out his full features?

A. Not fully. That is the reason I said he looks like —I was not certain.

Q. All right. Did he have a mask on?

A. Not when I saw him.

* * * *

Q. Are you prepared to tell us with absolute certainty the man you pointed out is the same man who was in the bank that morning?

A. No, I cannot.

Q. You just said that—

A. I said it looks like him.

Q. You have some reservations?

A. I cannot be certain that he is.

He was not called at the pre-trial hearing.

D. Mrs. Apple, the witness sitting in the car outside, testified at the pre-trial hearing:

Q. What was told to you by the officers at the time, the officer or Agent Markowvich of the FBI at the time these photographs were shown to you? Was anything said about the photographs that were shown to you?

A. No.

Q. What did you believe them to be?

stipulated all five color photographs could be received in evidence for the jury.

I am unable to agree with the conclusion of the majority that "[t]here was prejudicial error at the trial when the

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A. Well, I said that I thought that was the two men, I wasn't sure.

At the trial after identifying the two defendants before the jury, she testified on cross-examination:

Q. You were facing south. You say you saw the first man carrying a bag when he came around the corner, is that correct?

A. Yes.

Q. Also you didn't know there was a robbery?

A. At the first moment, I didn't know.

Q. All right. You only got a fleeting glimpse of that person, isn't that so?

A. That is right.

Q. Now, also at that time you didn't know there was a robbery, is that correct.

A. That is right.

* * * *

Q. Now, as the second man ran up 9th Street, which direction did he go?

A. He went through the alley way, too.

Q. As he ran past you, you did not see his full face?

A. No.

* * * *

Q. On either occasion, as these two people ran past you, you did not see their full face?

A. Yes.

Q. And you only saw at the most was a profile?

A. Yes.

Q. The right side of their face?

A. Yes.

Q. All right. Were there any distinguishing marks you might have seen on their face, a scar or a mustache or glasses or anything like that?

prosecutor insisted that the jury see the color photograph of Ash, entrenching that pre-trial identification, and notwithstanding the objection of counsel for Ash pointing out the prejudice to Ash the trial court ruled it would be received in evidence." Majority Opinion, at 24-25. This is because I do not believe the majority draws the correct inference from the events at the trial in making their assertions in footnote 6 that "The threshold objection of Ash's counsel was not waived . . . by his accession—in the face of the court's ruling—to a procedure whereby (a) all five photographs would be admitted . . . and (b) be admitted by stipulation—to resolve a squabble whether the photographs, already held admissible, should be offered by Bailey's counsel or the prosecutor."

In order to point up what I believe to be the majority's error here it is necessary for a rather detailed review of this part of the trial, which the majority discusses at 6 ff.

The controversy with which we are concerned was related to the showing of the color photographs to Mrs. Apple by Agent Hugh Berry at the Savarin Restaurant in Union Station on 7 May 1968 (see Transcript, pp. 45-46, Pre-Trial Hearing of 8 May 1968). At the trial in response to questioning by Bailey's attorney, Agent Berry testified

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A. No.

Q. Then the identification you made of those two individuals is only the profile, isn't that so?

A. That is right.

* * * *

Q. And your memory has dimmed since that time?

A. Yes, it has.

Q. Are you prepared to tell us with absolute certainty the two people who ran past you and you saw their profile are the same two people here?

A. I still say so.

Q. There is no question in your mind?

A. No, there isn't.

that Mrs. Apple identified one of the color pictures (then marked as Defendant's Exhibit No. 5 for Identification) "as the man who was engaged in the holdup" of the bank. (Transcript, p. 411.) This was the photograph of Ash. Bailey's attorney then showed Agent Berry Defendant's Exhibit No. 4 for Identification, which was the picture of Bailey, and established that Mrs. Apple made no identification of that picture. Bailey's attorney then offered Defendant's Exhibit No. 4 (the Bailey picture) into evidence. Ash's counsel then stated that he had no objection to *that* picture coming into evidence. (Transcript, p. 412.) After this offer by Bailey's attorney, but before the court had a chance to rule, the prosecutor stated that he thought the Ash picture (Defendant's Exhibit No. 5) should also go into evidence, and Ash's counsel noted that he would object to that.

Observe that at this point only *one* picture is being offered in evidence, Bailey's, by his own attorney, and it has been suggested that *only a second picture,* Ash's, be introduced. While no formal offer was made by the prosecutor, Ash's counsel has informed the court he would object to the second picture. Observe that what Ash's counsel has said he would object to is a situation in which *only two pictures,* those of Bailey and Ash, will be put into evidence.

At that point all counsel went to the bench, and the prosecutor stated that he thought all five of the color photographs should go into evidence. Bailey's attorney then apparently withdrew his motion to admit Exhibit No. 4 (Bailey's photograph). (Transcript, p. 413.) Following this, the proceedings at the bench are quite difficult to follow, but soon after, Bailey's attorney is again trying to offer something into evidence, and it appears to be the photograph of Ash that Mrs. Apple identified (Defendant's Exhibit No. 5). (Transcript, p. 416.) To this offer Ash's counsel stated, "I would oppose it." (Transcript, p.

416.) At this point what is being offered is still only one photograph, of Ash, this time by Bailey's attorney. The court, who had not ruled on this latest offer of Bailey's attorney, then suggested, "Should we introduce all five?" (Transcript, p. 417.) *To this suggestion by the court, Ash's counsel replied, "That might avoid prejudice against Ash."* (Transcript, p. 417.)

Next, back in open court, the prosecutor stated, "Your Honor, *it has been stipulated* that Defendant's Exhibits 1 through 5 are in fact the five photographs shown by Agent Berry to Mrs. Apple, *and it is further stipulated they may be introduced into evidence.*" (Transcript, pp. 417-419.) Bailey's attorney said, "That is so stipulated." And Ash's counsel then plainly and unqualifiedly stated, *"So stipulated."* (Transcript, p. 418.) The court then concludes, "They may be received in evidence," and the photographs were duly received. (Transcript, p. 418.)

Thus what Ash's counsel objected to (and it should be noted that he never really gets as far as making an objection, because no one actually offered Bailey's Exhibit No. 5—the photograph of Ash—into evidence in open court) is the offer of Ash's picture, alone or coupled only with Bailey's, and thus unquestionably identified as the picture that Mrs. Apple picked out as one of the holdup men. This offer was never made in open court, and indeed the only offer made in this entire controversy (Transcript, pp. 411-418) which was ruled on and accepted by the court was the offer made by the prosecutor (Transcript, pp. 417-418), to admit all five pictures. This is the stipulation, to which no one objected.

Thus it can be seen that the suggestion of the majority that Ash's counsel made an objection which was not waived by the stipulation is inaccurate. As demonstrated above, Ash's counsel *never actually got as far as making an objection,* and whatever qualms he did express *were made*

before, and not after, the Government's offer of the five pictures. Most important, this embryonic objection was directed to a situation in which Ash's picture would be offered either alone or as a pair with Bailey, and positively identified by the witness Apple as being the holdup man in contrast to that of Bailey which she did not identify. Understandably, Ash's counsel would object to this, but also understandably, he *did not object to all five* photos coming in, because *Bailey could not be denied his right* to show that the eyewitness, while capable of identifying another, had not identified him. The method chosen, admission of all five photos; carried the least possible prejudice to Ash, and therefore his counsel did *not* object.

The majority opinion holds that the admission of these five photographs was prejudicial to Ash, finally in "IV. Conclusion and Remand Order" saying "There was prejudicial error at the trial when . . . notwithstanding the objection of counsel for Ash . . . the trial court ruled it [Ash's photograph] would be received in evidence" (at 24-25). The majority opinion thus rests on a major factual error—there was *never* an objection, explicit or implicit, by Ash's counsel, to the admission of *all five* photographs—and a completely untenable legal premise, for both Bailey's attorney and the prosecutor were entitled to have the five photos in evidence, the first to show the eyewitness' failure to identify Bailey, the second to show (later) the same eyewitness' identification of Ash.

The tellers both testified that they could not make out the features of the gunman's face because of his mask; the depositor did have a look at the gunman (allegedly the appellant) when he first entered the bank, apparently before he donned his stocking mask; the lady in the car outside saw appellant only as he was running past her car. Thus the identification as to facial characteristics was weak at the time, but the description as to height, weight, and general build was proved accurate.

Although Judge Leventhal states that the first identifications in February 1966 were by "a showing of facial mug shots to witnesses who had not given a description in terms of facial characteristics,"[43] yet this does not mean that the four eyewitnesses would find it impossible to identify the appellant in the first group of pictures (the black and whites) submitted to them. All four of them *did* pick out appellant's picture, although only one was able to identify very tentatively his codefendant. This would seem to indicate that the witnesses retained a sufficient impression of the facial and other related characteristics of the gunman to identify him, although each expressed an honest uncertainty. One explanation of at least the two tellers' ability to pick out Ash's photo and to identify him at trial, where of course they saw the whole man, is revealed in one teller's testimony:

> Q. You couldn't make out his face, is that correct?
>
> A. That is correct.
>
> Q. Was there anything distinctive about his appearance, his height, his weight, his build?
>
> A. Yes, I noticed several things at the time. I noticed that he was a light-skinned negro, I noticed he was about six feet or in that neighborhood, I noticed that he was slender, I noticed he was very neatly dressed. *These things we are trained to notice in the event, notice all the little details, and we wrote them down immediately following the robbery.* (Emphasis supplied.)

In all the record of this case—with black and white photos, with colored photos, and in person in the courtroom—there was never an identification of any other person in the group of photos as being in the robbery, not even of appellant's codefendant, except by the witness in the car outside, who declined to make a firm identification until she had seen Bailey in the flesh.

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[43] Majority Opinion, at 11.

B. *The Alleged Taint of In-Court Identification of Ash by Pre-Trial Identification of His Pictures*

In two decisive ways the majority opinion fails to come squarely to grips with the test of *Simmons, supra*, and our own *en banc*-prescribed procedure in *Clemons* v. *United States*.[63]

1.

First, the Supreme Court in *Simmons* placed the burden on appellant to establish a Fifth Amendment violation: "Convictions based on eyewitness identification at trial following a pre-trial identification by photograph *will be set aside on that ground only if* the photographic identification procedure was *so impermissibly suggestive* as to give rise to a *very substantial likelihood* of *irreparable* misidentification." (Emphasis supplied.)[64] On this critical preliminary test, the majority vacillates. It finds "elements of suggestiveness . . . strong enough so that it cannot be assumed that there was no undue suggestiveness,"[65] but it also recognizes "indications offsetting in part the inference of undue suggestiveness."[66] Judge Leventhal then immediately turns to the rationale: "The identifications at trial were weak, and in fact no stronger than those given two years before on the basis of the mugshots."[67]

As to the five color photographs shown to three witnesses the day before trial and to one witness on the morning of trial, only three of the four eyewitnesses could identify Ash in these photographs and no one could identify Bailey. Again, if these photographs were suggestive, it is strange

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[63] 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968).

[64] *Simmons* v. *United States*, 390 U.S. 377, 384 (1968).

[65] Majority Opinion, at 9, 10.

[66] Majority Opinion, at 10.

[67] *Ibid.*

that they were suggestive only as to Ash for three witnesses, and for the fourth suggested nothing—although on the same day he did identify Ash at trial.

In contrast to the three factors listed by Judge Leventhal, there is a factor suggestive as to one of the other three persons. There were three photographs of this person, full-face and right and left profiles; of Ash and Bailey there was only a full-face each.

We must assume that the photographs of Ash and Bailey are reasonably good likenesses; if not, either the trial judge at the pre-trial hearing or counsel for the prosecution or one of the defendants would surely have pointed this out.

The question of course is what influence viewing these pictures had on identification at the trial. While the majority lists three factors that might appear suggestive as to the identification of Ash when the witnesses were picking out his photograph, these same factors would lead the witnesses to pick out Bailey, if these factors were truly suggestive. None of the four identified Bailey. Furthermore, one of the four witnesses who did identify Ash at trial was unable to pick him out from the photograph, even though it was full-length.

As to why Bailey was not identified in these pictures by anyone, there are two possible explanations: (1) Bailey actually did not participate in the bank robbery; or (2) all of the witnesses had less opportunity to see Bailey in his alleged role of scooping up the money behind the tellers than they did to see the gunman (allegedly Ash) who was in the bank longer and attracted more attention. Either of these reasons points to the authenticity of the witnesses' identification of Ash in the photographs and at trial and likewise negates any inference that the photos themselves were suggestive or in any way contributed to the identification of Ash at trial.

Considering all of the above, I can only conclude that

the photographs were not suggestive as to Ash, at least to the extent of having any effect whatsoever on the eyewitnesses' in-court identification of Ash and their in-court failure (with the exception of the witness outside in the car) to identify Bailey at all.

At trial the four eyewitnesses stated that their in-court identification of appellant Ash was based upon their opportunity to observe at the time of the bank robbery, and each gave the details as to his or her opportunity to observe. Most significantly, each witness emphasized that his or her identification of appellant was *not* certain and conclusive. As shown by the language quoted in footnote 61, *supra*, each witness' identification was highly qualified, even that of Mrs. Apple (in the car outside) who finally wound up saying that she was "certain," but prior thereto had given ample evidence of her uncertainty.

As stated above, the key to the majority's position on the Fifth Amendment ground is suggestivity in the photographs. Where the issue is suggestivity and taint of the in-court identification, the key question is not whether the in-court identification is strong or weak, as Judge Leventhal emphasizes. The key question is whether the in-court identification is *consistent with* the pre-trial identification and the opportunity the eyewitnesses had to see the appellant at the scene of the crime. I think that the testimony of the eyewitnesses in court identifying appellant Ash was consistent with the opportunity that these eyewitnesses individually had to observe Ash at the scene of the crime, as shown by their testimony quoted in footnote 61, *supra*. The language of the witnesses' in-court identification is, in fact, also consistent with the degree of certainty manifested by each witness in identifying appellant Ash from the original set of five black and white photographs shown a little over five months after the crime.[68]

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[68] Agent Markowvich testified that the four witnesses to

Precisely because the original black and white photographic identification of Ash by each of the four witnesses, only five months after the crime and before Ash was arrested, *was* consistent with the degree of certainty of both the in-court identification and the colored photograph identification, it is of some legal importance. Since *Wade* is not retroactive,[69] it cannot be maintained that there was any constitutional requirement of counsel at the February 1966 photographic lineup. Thus, it can be said of these identifications that ". . . each of the eyewitnesses testifying at trial had already made identifications at a valid showup or lineup prior to viewing the [color] photographs. These eyewitnesses had established their ability [whatever it was —strong or weak] to identify the suspects; the viewing of the photographs merely served to refresh their memories of the men they had previously chosen"[70]—as this court said in *United States* v. *Hines and Ware*, decided 1 November 1971.

In *Hines and Ware* the prosecutor was doing exactly what Ash's prosecutor did, show the accused in a group of photographs to each witness on the eve of trial, in order to make sure the witness' recollection was still *the same as in the previous identification.* In neither *Ash* nor in *Hines and Ware* was there an attempt to secure an *original identification;* rather, *that had already been done under circumstances permissible at the time the original identification* was made.[71] In fact, in *Ash* one witness (the

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whom he showed the black and white photos on 3 February 1966 "were not positive in the identification at that time."

[69] *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[70] *United States* v. *Hines and Ware* —— U.S. App. D.C. ——, —— F.2d —— (Nos. 23,281 & 23,291, slip op., at 25).

[71] The original identification of Ash by all four witnesses never came before the jury at trial. These identifications, made before Ash was arrested, were properly brought out

depositor, Taylor) did *not* identify Ash from the colored photographs on the eve of trial, although he had done so from the black and white photographs before Ash was arrested and did so in the courtroom at the trial itself.

I recognize, of course, that the court's opinion in *Hines and Ware* states, "Where, as here, positive identifications have already been made, the point at which the witnesses merely review their prior identifications cannot normally be considered a critical stage for Sixth Amendment pur-

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in the pre-trial hearing, and thus formed part of the basis on which the trial court clearly ruled the witnesses had an independent origin for their in-court identifications. There was no hint of suggestivity in the photos themselves or in the manner of presentation, done by two FBI Special Agents, not the police. The fact that the prosecution, 18 months before *Wade* was decided, did not preserve these identical photos for later comparison, should not prevent the trial court and ourselves from considering the identifications then made as a basis for a finding of independent origin. (The identical photos of Ash and Bailey *were* preserved, and the names of the other three persons, enabling photos of them to be presented to the trial court.)

It must be kept in mind that the prosecution never intended to make previous photographic identification a part of its case. The previous identification of Ash in the color photographs came out as a prosecution response to the proof *by Bailey's attorney* that no one had identified Bailey in the colored photographs, evidence for Bailey which had to be admitted, and the whole story of the witnesses' identification of Ash—including Taylor's *failure* to identify him—then came in by stipulation. For a detailed description of the trial proceedings that resulted in this stipulation, see text following note 61, *supra*. The prosecution never displayed the colored photographs to the witnesses for the purpose of using the resulting identifications in court, these displays were simply pre-trial review as in *Hines* and *Ware*, *supra* note 70, but given the turn of events at trial and the previous black and white photo identifications two years earlier, the prosecution was entitled to offer the colored photo identifications.

poses. Such review by means of photographs does not taint an in-court identification, but may affect its weight if the defense chooses to develop the matter by cross-examination."[72] I also recognize that the previous identifications in *Hines and Ware* were "positive," and although "all four witnesses selected the [black and white] photograph of appellant [Ash] as the gunman," that "they were not positive in the identification."[73] The identifications in *Hines and Ware* were positive throughout, while the testimony of all four witnesses in *Ash*, whether of the black and white photographs, color photographs, or in-court identifications, revealed the same honest qualifications as to certainty. Yet these four were eyewitnesses, and honestly expressed uncertainties have always been for the jury to weigh. These uncertainties have not, and should not, cause the testimony to be barred completely on the standard of *Simmons*, which requires "procedure . . . so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

In cases involving different circumstances, it is true that a *strong* in-court identification of the accused, based on an opportunity for a clear identification at the scene of the crime, would show an independence of any taint derived from viewing photographs of the accused between the time of the crime and the time of trial. In a converse factual situation, as we have here, the *weak* trial identification of all the witnesses, completely consistent with their weak identification of the accused by the initial set of photographs, likewise shows the independence and freedom from taint of their recollection at the time of their in-court identification. The majority opinion frankly states, "The identifications at trial were weak, and in fact no stronger

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[72] *Hines* and *Ware*, *supra* note 70, slip op., at 25.

[73] Majority Opinion, at 5, 24.

than those given two years before on the basis of the mug shots." [74]

Where suggestively in the pre-trial identification procedures is charged as here, the key question is *independence* of the in-court identification, the *consistency with* the pre-trial identification, the *absence of a taint* derived from previous photo identification—not whether the trial identification is strong or weak—which determines under the standard of *Simmons* whether the in-court identification can be achieved in evidence.

2.

This brings us to the second of the two decisive ways in which the majority opinion fails to grapple with the problem according to established standards, this time by our own court *en banc*.

The majority opinion apparently relies on two bases here: (1) that the colored photographs were suggestive, and (2) that the District Court's finding of independent source cannot be sustained. Both, I submit, are wrong on the legal standard as applied to the facts here. The first, even if true, could not be decisive on the Fifth Amendment issue; the opinion's reasoning rests the second conclusion on the first; and, in reaching the second conclusion, the opinion contradicts our *en banc* decision in *Clemons*, *supra*.

The opinion at two places takes pains to point out that the trial court did not expressly say that the photographic presentation was not suggestive,[75] and in each instance the opinion draws the inference that "[I]f anything [the] independent source determination rested on an assumption of undue suggestiveness." [76] Yet no finding of suggestivity

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[74] *Ibid*, at 10.

[75] *Ibid*, at 6, fn.5, and at 10.

[76] *Id.*, at 10.

being present could be decisive on the Fifth Amendment issue (although a finding of no suggestivity could be), such finding merely places the burden on the prosecution to establish an "independent origin," as the Supreme Court clearly laid down in *Wade, supra*, and as the majority opinion apparently recognizes here.[77] Of great importance, the District Court did make an unmistakable finding on the decisive issue, "the Government has established a basis for an in-court identification by clear and convincing evidence."[78] In *Clemons* v. *United States, supra*, this court *en banc* unqualifiedly recognized the decisive nature of such a finding by the trial court:

> The Supreme Court has, as noted above, expressly contemplated that in-court identifications may be found capable of standing on their own feet, even though preceded by deficient pre-trial confrontations. It has also emphasized the key role which the trial court, because of its direct exposure to the witnesses, plays in any such determination.[79]

Instead of resting his "independent source" determination "on an assumption of undue suggestiveness," the District Judge was doing no more than we told him to do in *Clemons*. There we exhorted the trial judges to make this finding of independent origin, even though the pre-trial identification had been found non-suggestive, because if on appeal this first finding were held erroneous, a remand would be avoided if the District Court had already made its finding of independent source for the in-court identifications.[80] Hence, even if the majority here made a finding on this appeal of suggestivity, Ash's conviction should not be reversed.

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[77] *Id.*, at 10, and p. 25, fn.20.

[78] *Transcript* (of Hearing), at 103.

[79] 133 U.S. App. D.C., at 38, 408 F.2d, at 1241.

[80] See 133 U.S. App. D.C., at 34, 42, 408 F.2d at 1237, 1245.

Ash falls squarely within the rule of *Clemons* and *Wade*. Whether Judge Gasch made a finding on suggestivity or not (clearly, the majority think he did not), he unquestionably made a clear finding of independent source for the Government's in-court identification, as recognized by the majority opinion. On the tests of *Simmons* and *Clemons*, and with reference to the action taken by the Court in *Wade*, Ash's conviction must be affirmed.

One more consideration needs to be stressed in regard to the weight to be given Judge Gasch's decisive finding in the District Court. Unless this Court of Appeals is resolved to try these identification cases *ab initio* on a cold record, we owe some weight to the trial judge's findings. We are admonished by the Supreme Court to do so, we gave recognition to that in *Clemons, supra*, and in concurring in *Clemons* Judge Leventhal himself, with whom joined Judge (now Chief Justice) Burger, pertinently remarked:

> . . . these matters are properly to be resolved by the trial judge, at least in the first instance, and . . . appellate resolution marks the rare exception.[81]

I am impressed by the careful pre-trial hearing conducted by the District Judge here. We should weigh his opportunity to see and hear the witnesses in person, and to see not only the photographs but the defendants. We should not be disposed to upset his determination that the witnesses could make an in-trial identification untainted by their previous photographic identifications, and therefore that to permit such would not violate any due process rights of the appellant.

The majority has apparently attempted to brush aside the trial court's explicit finding of independent source merely because a lineup was not held, and to support this the majority cites our recent cases of (Anthony) *Long* v.

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[81] 133 U.S. App. D.C., at 49, 408 F.2d, at 1252.

United States[83] and *United States* v. *Gambrill*.[84] With regard to *Long*, I believe that the trial judge here was satisfied that the independent source met the test specified in *Long*: "that prior to the tainted confrontation the witness was capable of making a spontaneous identification of the suspect based upon his observations at the time of the offense."[85] On the facts as they have been presented to us, the finding that the eyewitnesses who identified Ash did so as a result of observation of him at the time of the crime meets any requirements specified by *Long*.

As for *Gambrill*, there the court did say "our own view of the entire record may impel us to conclude that the evidence concerning the existence of an independent source is insufficient to satisfy the burden which rests upon the Government,"[86] but in view of the great differences between this case and *Gambrill* I do not think that holding has any bearing here. In *Gambrill* there was only one identification witness, an understandably excited rape victim, and her observations (the "independent source") were made in a dimly-lit area, outdoors at night, and were of assailants who wore handkerchief-type masks during a substantial part of the encounter. Here we have four identification witnesses, each with his own "independent source" of observations made during the midmorning in a brightly-lit bank or outside, and two of the four witnesses had an opportunity, albeit fleeting, of observing the defendent when he was unmasked. The *Gambrill* case and this case are not comparable; indeed, I think the difference here is between night and day.

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[83] 137 U.S. App. D.C. 311, 424 F.2d 799 (1969).

[84] —— U.S. App. D.C. ——, 449 F.2d 1148 (1971).

[85] 137 U.S. App. D.C., at 315, 424 F.2d, at 803.

[86] —— U.S. App. D.C., at ——, 449 F.2d, at 1157.

Given the far greater evidence of independent source that we have here, I would uphold the trial judge's finding of "clear and convincing" evidence of independent source. It is significant that *Gambrill* cited no other case reversing the holding of the trial judge on the question of independent origin, as we noted in *United States* v. *Johnson and Estes.*[88] *Zeiler II* is the only other case which has come to my attention, and there the Third Circuit reversed to say that the evidence of independent origin *was* quite sufficient to justify in-court identification.

The lesson from all the cases, beginning with *Wade*, continuing with *Simmons* and all our own decisions, including *Clemons en banc*, is that the trial judge's decision on independent origin, being a question he is peculiarly well equipped to decide, should stand, with only a "rare exception." (Even the reversal of the trial court which we make today in *Brown and Proctor* is no exception, for there the trial court made implicit findings of independent origin, but erroneously let the absence of counsel bar the identification testimony.)

Whatever uncertainties or weaknesses existed in the four eyewitnesses' testimony, they were fully exploited by both defendants' counsel, and were glaringly apparent to the jury—which convicted Ash but not codefendant Bailey.

In considering the admissibility of identification evidence at trial, constitutional infirmities will bar its admisson, but testimonial infirmities go only to the weight of the evidence. We start with the principle, well phrased by Judge (now Chief Justice) Burger in a different context but thoroughly applicable here: "When an eyewitness is willing to give testimony, under oath and subject to all the

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[88] —— U.S. App. D.C. ——, —— F.2d ——, (Nos. 23, 375 and 23, 376, decided 20 October 1971, slip op., at 14.)

rigors of cross-examination and penalties of perjury, he must be heard." [87]

The testimony of the four eyewitnesses here was not tainted by their previous examination of and identification of appellant Ash by the photographs. Nor was there any "critical stage" at which the right to counsel was denied. The witnesses' testimony was shown to be wholly their own testimony, whatever its strength, and they were properly heard.

I would affirm the conviction.

MacKinnon, *Circuit Judge*: I concur in Judge Wilkey's dissent. As I read the Sixth Amendment, its guarantee of the "assistance of counsel in his defense" does not require that defense counsel be present when the Government attorney or investigator interviews witnesses, whether they are shown pictures of the defendant, other suspects, crime scenes, instruments of the crime, evidence of the crime or prior testimony, or there is other discussion of the relevant facts in the case. In any given case any one of these incidents might uncover evidence that would be "critical" for the defendant, but the requirement that counsel be present is restricted to legal proceedings and those instances where the defendant himself is physically present.

The Sixth Amendment

In my view the majority opinion not only misreads the Sixth Amendment but also, in attempting to make its decision appear reasonable and workable, takes a very unrealistic view of the prosecution of criminal cases. It seems

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[87] *Brown* v. *United States*, 126 U.S. App. D.C. 134, 143, 375 F.2d 310, 319 (1967).

to believe that the investigation of a criminal case ceases with a grand jury indictment and that the FBI report is then wrapped with a blue ribbon which is not untied until the case comes on for trial. Far from it. An important criminal trial needs constant investigation. After a suspect is arrested, new witnesses may appear, new facts may appear and new theories may develop as additional facts become known. Such post-arrest developments may further incriminate the defendant and make his conviction more certain or they may lead to an acquittal or dismissal of the charges. The fact that an arrest has been made, or even that an indictment has been returned, is no justification for stopping the investigation. That is an ongoing thing right up until trial and frequently into the trial as the defense may then present new witnesses for the first time. The investigation may even continue after trial.

Under the majority opinion, after defendant's arrest the defense counsel would have to be notified every time a new or old witness was shown any photographs of the defendant or other suspects. This will constitute an unreasonable interference with post-arrest investigations and would require defense counsel to be present wherever such photographs may be shown by police or FBI personnel to any witness anywhere in the country.

Such requirement is wholly unreasonable and particularly so when applied nationwide as it must be if this is, as the majority say, a constitutional requirement. Even though we have a great many local crimes in the District of Columbia where identifications are completely local matters we cannot convert the Sixth Amendment into a provincial rule. We must recognize that, if the law is as stated by the majority, whenever any FBI agent interrogates any witness anywhere in the country after a suspect is arrested and has counsel, if the agent intends to exhibit any photograph of the accused, that defense

counsel must be notified, be present, etc. Such requirement is completely unworkable and, in my view, particularly with respect to federal crimes, many of which involve interstate activity and hence out of state witnesses, is not required by the Constitution.

The Identification of Ash

I also dissent from the failure of the majority opinion to recognize the full import of the identification testimony against Ash. It was not limited to "height, weight, age and build" as the majority opinion states (slip op. 9). In addition to the testimony as to height, tall, thin, shorter than the other, more muscular, slender, taller than the other, there was testimony that the suspects were: "not too dark complected" (Tr. 125); "light skinned negro" (Tr. 182); "neatly dressed" (Tr. 182); "extremely neat" (Tr. 182); [had a] "mustache" (Tr. 192); [wore] "no glasses" (Tr. 192, 220); wore masks. Also, the witness Betty Apple, who made a positive in-court identification of both men—she was "absolutely certain" and that there was no question in her mind (Tr. 220)—had seen the same two men ten minutes before she observed them outside the bank. At that time they were in a cream colored Pontiac convertible that was parked in front of her husband's restaurant about a block away from the bank (Tr. 213-214). They were then unmasked and she saw them ten minutes later, again unmasked, as they fled from the bank with one carrying a large paper bag. On both occasions she was seated in a parked car at the restaurant and bank respectively and had a good opportunity to identify the men. In front of the bank they passed within five feet of where she was seated in the car and her testimony is very valuable because she recognized (suspected) at the time, from their running and carrying a paper bag, that a bank robbery had been committed (Tr. 221, 197). She was thus alert to the consequences of what she was observing.

There was also other substantial evidence that fully corroborated the finding of the jury that Ash committed the crime. This was particularly the testimony of McFarland. While he had a criminal record and could benefit from Government favors, still the story he told had the ring of truth because of a number of recounted elements that a person could only have known if he had talked to some person who was knowledgeable about the details of the crime. That he had a criminal record does not disqualify him as a witness. The Government cannot pick and choose witnesses. In a criminal trial it must take its witnesses where it finds them and it is not unusual for it to find certain witnesses with criminal records who have knowledge of the criminal activities of others. That is but a fact of life. Criminals associate with other criminals. The Government cannot be expected or required to prove criminal conduct solely through witnesses who frequent houses of worship. Where known criminals testify against criminal defendants it is sufficient for the jury to know the record of the witnesses, as they did with respect to McFarland, to be properly instructed thereon and to give such testimony such weight as they consider proper under the circumstances. The weight of the testimony is for the jury.

The Colored Photographs

Having said the foregoing, I find that the five colored photographs, which were shown to all the witnesses shortly before trial, were impermissibly suggestive. Photographs of only five individuals were shown at that time—one of each of the defendants and pictures of three other individuals. (There were three pictures of one of the other individuals.) From my personal examination of these exhibits viewed in the light of the full transcript, I find these pictures to have been impermissibly suggestive because *those of the defendants Ash and Bailey were the*

only photographs of tall slender men, which was the prior description of the robbery suspects by all the witnesses. The other three pictures were all of men who appeared to be heavy and not tall. However, the court held a full hearing on all the identification testimony and in my opinion found that the witnesses had a sufficient independent source to make an in-court identification (Tr. 102-103). In support of this conclusion it is extremely significant to note that the testimony of the identification witnesses with respect to Ash was substantially consistent throughout. There was a slight variation between Betty Apple's in-court identification of Bailey and her identification in the court house corridor.[1] (*See* Appendix, which charts the various identifications by the principal witnesses.)

Thus, there is every reason to believe the testimony of the witnesses that they were relying upon their own independent recollection of what they had previously observed. If the photographic procedures were as suggestive as the majority contend, they failed to produce any demonstrable effect upon the testimony. It is pure speculation for the majority to suggest that the identification testimony might have been less strong than it was formerly if the colored photographs had not been shown. I thus find no basis for upsetting the finding of the trial court that the evidence was admissible.[2]

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[1] In this respect it differs from United States v. Gambrill, —— U.S.App.D.C. ——, 449 F.2d 1148 (1971), where the witness' testimony at trial was substantially stronger than it had been prior to being shown single photographs of the suspects.

[2] While the admission of the identification testimony is a separate question, it is not without significance that defense counsel *stipulated* to the admission into evidence of the colored photographs (Tr. 418). They were defendant Bailey's exhibits (Tr. 418) and hardly a basis for the majority to find constitutional error against the Government in their admission.

One factor that troubled me, on first reading the cold record, briefs and the majority opinion, was the fact that the Government showed facial pictures to two witnesses who had only observed the robbers while they were wearing stocking masks. Obviously, if a person has not seen one's face, it is the height of impermissible suggestion to exhibit facial pictures to him of a person that the exhibitor knows is a strong suspect. Under such circumstances implicit suggestion could also lurk merely in a normal lineup that did not display various individuals with a close range of physical features similar to those that had been observed. However, after my initial doubts as to the propriety of showing facial photos, further investigation disclosed sufficient facts for me to conclude that it was proper here to exhibit facial pictures to the witnesses. I reach this conclusion because, while there was testimony that both robbers had worn masks, they had worn *stocking* masks and, to the extent that it was covered by testimony, the masks only came down to a point "right under his nose" (Tr. 167, 182). This left the upper lip (mustache area) and chin areas completely exposed. The facial features below the mask which were exposed could be observed and so could the color of the skin. The two appellants here had distinctive features in this area—one a mustache—and the other an unusual-type chin.

I place no great significance on the failure of the witnesses to articulate the individual facial features that they observed. Looking at a person for the first time to many people is much like looking at a sunset or a painting. Unless the viewer is a trained observer his initial impression is inclined to be stated in total rather than fragmented impressions. And for many persons it is difficult, *particularly without specific questions being asked*, to articulate the separate features they retain in their mind of the complete features that make up their individual recollection of the complete physiognomy of the suspect.

Moreover, while there was no specific evidence on the point, it cannot be ruled out that the masks which were used here were made of *sheer* stockings which one could see through. Obviously those who were wearing the masks saw through them.[3] If those wearing the stockings as masks could see through them, then other persons could see some of their features through the thin fabric of the hose. Thus, other facial features above the upper lip might have been observed to some extent, albeit in a possibly slightly distorted state. So in view of the opportunity that the witnesses did have to view the facial features of the suspects, I find that it was entirely proper to show the facial photographs to the witnesses. In this respect, the cold record requires a close examination to find out the true situation. The majority opinion, in my view, does not reflect this.

To the extent that the majority opinion differs from the foregoing, I respectfully dissent therefrom.

Judge Robb concurs with the views herein expressed.

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[3] One witness thought "there must have been holes for his eyes. I don't remember that" (Tr. 167). The other witness testified, "He had a stocking cap over his face" (Tr. 181). A third witness said he did not have a mask on in the bank "when I saw him" (Tr. 192). This apparently contradictory evidence might be reconciled since the three witnesses had different views of the robbers, at varying distances and at slightly different times.

APPENDIX

Witnesses to Offense of Aug. 26, 1965	Observed Robbers		Feb. 3, 1966 Black & White Photos	May 7, 1966 Color Photos	May 8, 1968 Trial Identification
	With Mask	Without Mask			
Mrs. Ruby Paugh (Teller)	X		Not positive—identified	Selected Ash photo. Was not absolutely certain. Thinks this was him (Tr. 51)	Could make no definite identification—"looks similar" (Tr. 160)
Mrs. Jean Major (Teller)	X		Not positive—identified	Selected Ash photo. (Tr. 45) Was not absolutely certain. Thinks this was him. (Tr. 52)	Believed Ash was gunman (Tr. 177, 182) "I have no doubt in my mind but I cannot say with absolute certainty" (Tr. 183)
Mr. Joseph Taylor (Pastor, customer)		X	To best of his belief (Tr. 16) Ash was gunman, but he could say positively if he could see him in person.	Unable to identify color photo on May 8, 1968 (Tr. 47)	Looks sort of like the man I saw coming in (Tr. 188) Not "absolutely certain . . . it looks like him. I cannot be certain" (Tr. 194)
Betty Apple (Street observer)		X (1)	(2) "Wasn't sure, it looked like [Ash]" (Tr. 16, 200)	Selected Ash photo. Was not sure. Believe photo was of the robber (Tr. 52, 201). Did not select photo of Bailey (Tr. 201)	Identified both defendants in person in court room (Tr. 197, 198) "With absolute certainty—there is no question in [my] mind" (Tr. 220)

(1) Observed both defendants one block away from bank ten minutes before robbery and ten minutes later in front of bank.

(2) She had been shown photos on January 23, 1966 by policeman (Tr. 370). On February 18, 1966, she had pointed out Bailey among 50 other persons in corridor of General Sessions Court Building (Tr. 72-74, 372). She "believed" Bailey was one the men (Tr. 82).

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,452

UNITED STATES, APPELLANT

v.

RUFUS BROWN,
PAUL V. PROCTOR,
SAMUEL A. WILLIAMS

Appeal from the United States District Court
for the District of Columbia

Judgment entered this date

Decided March 15, 1971

Opinions filed March 1, 1972

Mr. Robert J. Higgins, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery,* United States Attorney at the time the brief was filed, *John A. Terry* and *Robert A. Shuker,* Assistant United States Attorneys, were on the brief, for appellant.

Mrs. Carol Garfiel Freeman, with whom *Mr. James B. Blinkoff* (both appointed by the District Court) was on the brief, for appellee Brown, argued for all appellees.

Mr. Jerome J. Dick (appointed by this court) as *amicus curiae.*

Messrs. Ira M. Lowe and *Eugene P. Hines* (both appointed by the District Court) were on the brief for appellee Proctor.

Mr. Sol Z. Rosen (appointed by the District Court) was on the brief for appellee Williams.

Before BAZELON, *Chief Judge*, and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and WILKEY, *Circuit Judges*, sitting *en banc*.

Opinion for the Court filed by WILKEY, *Circuit Judge*, with whom *Circuit Judges* MCGOWAN, TAMM, LEVENTHAL, MACKINNON, and ROBB concur.

Dissenting opinion filed by BAZELON, *Chief Judge*, at p. 21.

Dissenting opinion filed by WRIGHT, *Circuit Judge*, with whom Chief Judge BAZELON and *Circuit Judge* ROBINSON join, at p. 27.

WILKEY, *Circuit Judge*: This is an appeal by the Government under 18 U.S.C. § 3731 from an order of the District Court suppressing "any photographic or in-court identification of the defendants Rufus Brown and Paul Proctor by Mrs. Barbara Edgecomb" at the trial. The case was initially argued before a three-judge panel of this court. We subsequently ordered *sua sponte* that the case be set down for argument and decision *en banc*. Finding the action of the trial court erroneous, we have vacated the order of the District Court and remanded the case for trial.

I. *Facts and Proceedings Made the Basis of the District Court Order*

A. *The Offense*

According to the evidence given at the suppression hearing, on 27 June 1969 two armed men, identified by eyewitnesses as appellees Proctor and Brown, robbed a Washington liquor store. During the course of the robbery the

retired store owner, Israel Burka, arose from where he had been seated and took a few steps. Without uttering a word, Proctor allegedly shot Burka in the back. According to the Government's evidence, while Burka lay face down on the floor in a large pool of blood, Brown forced the store manager to open the safe, and Proctor herded customers and clerks behind a counter.

As Mrs. Barbara Edgecomb, a customer who was the first to file behind the counter, stopped next to the fatally wounded Burka, she bent down to help him. As she looked up, the robber (identified as Proctor) who had fired the bullet into Burka's back was "right there," only three and a half feet away. Mrs. Edgecomb had other opportunities to observe both robbers at varying distances during the seven to eight minutes the robbery consumed. One hour later Burka was dead.

B. *The Lineup*

By October 1969 the police had information that appellees Proctor and Brown had robbed the liquor store, and that appellee Williams had driven the getaway car. Proctor was quoted as saying that he had "shot an old man." After arrest, in a lineup on 4 November 1969 two witnesses identified Proctor and Brown as the gunmen.

At the lineup Proctor was represented by the same counsel who later appeared for him at the pre-trial hearing and on this appeal. Brown was also represented by counsel at the lineup; different counsel were subsequently appointed for him and have represented him at the pre-trial hearing and on appeal.

Brown does not claim that the lineup was unfair; Proctor contends it was. At the lineup the only objection clearly made by any counsel was that the defendants were brought there by an illegal arrest, an issue which is not before us on this appeal. In argument before the three-

judge panel counsel for both sides agreed that the record is unclear whether Proctor's counsel objected to the lineup on the grounds that Proctor was the only one of the nine persons who had a goatee. It is agreed that the witnesses at the lineup gave no indication that Proctor was in any way unique. In the lineup picture which we have in the record, it appears that the man next to Proctor has a mustache and goatee, as does Proctor. Six of the nine appear to have mustaches of varying density and style.

Appellees' counsel on appeal agreed that, without the lineup photo having been shown to Mrs. Edgecomb, her testimony would be admissible at trial for whatever weight the jury chose to give it.

C. *The Witness Edgecomb*

In the pre-trial hearing Mrs. Edgecomb described the gunmen as she saw them at the time of the killing, and was able to give a very detailed description of both men. She said the light in the liquor store was fairly good, that there was no trouble with the light at all. She saw Brown for about three minutes, at times as close as four feet.[1] Proctor she remembered specially when she was standing next to the head of the fallen Burka while Proctor hovered over Burka's feet.[2] Immediately after the

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[1] She described Brown as a tallish man; slender; a long face, with a long cheekbone to the jawline, high forehead; lightish complexion; hair cut shortish, not an Afro cut but beginning to fill, about an inch and a half long; wearing a greenish shirt with long sleeves, kind of a checkish thing; wearing grayish or tan slacks.

[2] According to Mrs. Edgecomb's description, Proctor had a heart-shaped face; medium dark complexion; about 5'11" in height; high cheekbones, accentuated cheekbones; wearing a burgundy-maroonish kind of shirt, and his sleeves weren't short. "He had the beginnings of a mustache and a goatee-type beard." His eyes were "lazy," with heavy lids, well-shaped brows, hair about an inch and a half in length.

killing she and her husband went to the police building, saw a great number of pictures, but were unable to identify either of the two gunmen; nor were they able to do so on three other occasions when shown other photographs by the police.[8]

After the robbery was over Mrs. Edgecomb did not talk to her husband about what the gunmen looked like, "because we wanted to forget about it at that time." While riding to the lineup on 4 November 1969, Mrs. Edgecomb told her husband that she thought she would know the robbers again. However, when she viewed the lineup, she was unable to identify anyone under the lights, which "just made people's faces look like blobs." Particularly she could not tell differing complexions. Under the lighting conditions she felt that she could not "fairly say for sure."

On the way out of the police headquarters Mrs. Edgecomb did say to one of the policemen, "I wasn't sure about a certain person in the lineup, but that I wouldn't say yes for sure, that I'd like to see the lineup pictures." On 19 May 1970, about two weeks prior to the scheduled trial, Mrs. Edgecomb came to the office of the prosecutor who was to try the case. In the course of the pretrial interview of the witness, he said, "You wanted to see the picture of the lineup, here it is." Mrs. Edgecomb, without being asked or instructed, in the presence of the prosecutor and a detective of the homicide squad (her husband was outside the office), picked up the lineup photograph and systematically went down the line, reading from left to right. Originally she focused on Proctor; then she "liked" Proctor, Brown, and the man on the left

[8] It was only on the latter two of these occasions, 25 and 26 October 1969, that pictures of Brown and Proctor were included in the groups of photographs viewed. See *infra*, pp. 23-24.

end next to Proctor (with mustache and goatee); and finally she chose Proctor and then Brown as the two robbers. Originally Mrs. Edgecomb had described Proctor at the time of the killing as having "the beginnings of a mustache and a goatee-type beard." On seeing the lineup picture, she commented that the growth of his beard was different, that it was fuller in the lineup picture than at the time of the robbery.

D. *The Trial Judge's Suppression Order*

The trial judge ruled that the 4 November 1969 lineup was properly conducted and that two other witnesses, liquor store employees, could testify as to their lineup identification and make whatever in-court identification they could. As to Mrs. Edgecomb,

> However, the Court feels that in view of the fact that she did not pick out the people at the time of the lineup, and with an abundance of caution on behalf of the defendants, the Court will deny the use of her identification of the defendants in the photograph at a later time.

The court further added,

> In view of the fact that the photographic identification is excluded the Court feels that she should not make an in-court identification of the defendants at the time of her appearance here in fear it might be tainted in some way by the recent viewing of the photograph.

Although the trial court did not mention the Fifth or Sixth Amendment in making her suppression ruling, footnoted *in toto* and sequentially below,[4] nor did she make

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[4] The trial court's opinion, delivered orally from the bench, together with the inquiries of counsel with respect thereto, appear in the record as follows:

> THE COURT: The Court has taken under advisement the question of the identification by Mrs. Edgecomb.

a specific finding as to any independent source, it appears that the District Judge's ruling is relevant in the following manner to the two points alleged to be at issue on this appeal:

It appears that Mrs. Edgecomb did have an ample opportunity to observe the two defendants while in the store.

However, the Court feels that in view of the fact that she did not pick out the people at the time of the lineup, and with an abundance of caution on behalf of the defendants, the Court will deny the use of her identification of the defendants in the photograph at a later time.

There is no question in the Court's mind that there was nothing improper insofar as her having seen the photograph in [the prosecutor's] office.

However, it is felt that since this was after the lineup and close to the trial that it would have perhaps been better if counsel had been present at the time.

In view of the fact that the photographic identification is excluded the Court feels that she should not make an in-court identification of the defendants at the time of her appearance here in fear it might be tainted in some way by the recent viewing of the photograph.

[DEFENSE COUNSEL]: Thank you, Your Honor.

[THE PROSECUTOR]: Is it Your Honor's ruling then that there is some taint in the viewing of the photograph?

THE COURT: Just with an abundance of caution insofar as the defendants are concerned.

The court feels if there is any question that it should be resolved in favor of the defendants and, therefore, that is the reason for the Court's ruling.

In view of the fact that she had seen photographs over a period of time and not made the identification before or at the lineup of the defendants the Court feels that the later identification just might be subject to question.

[THE PROSECUTOR]: As I understand it, Your Honor had stated that there was ample opportunity for

1. Appellees' Sixth Amendment claim under the doctrine of *United States* v. *Wade*[5] that representation by counsel was denied at a critical stage:

a. "It is felt that since this was after the lineup and close to the trial that it would have perhaps been better if counsel had been present at the time."

b. "I think that if they had been present there would have been no question about it."

c. "But there is always a question in their minds, defense counsel's minds, as to just exactly what did happen at that time when she had not been able to determine prior thereto."

2. Appellees' Fifth Amendment claim of denial of due process on the grounds that the procedures followed were "so unnecessarily suggestive and conducive to irreparable mistaken identification," and the existence or non-existence of any independent source for the in-court identification:

a. "It appears that Mrs. Edgecomb did have an ample opportunity to observe the two defendants while in the store."

b. "However, the Court feels that in view of the fact that she did not pick out the people at the time of the lineup, and with an abundance of caution on behalf of the defendants, the Court will deny the use of her identification of the defendants in the photograph at a later time."

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her to observe but that it was the Court's feeling that counsel should have been present when she viewed the photograph of the lineup?

THE COURT: I think that if they had been present there would have been no question about it.

I don't feel there was anything at all improper about counsel's having shown her the photograph or actually her looking it over but there is always a question in their minds, defense counsels' minds, as to just exactly what did happen at that time when she had not been able to determine prior thereto.

[5] 388 U.S. 218 (1967).

c. "There is no question in the Court's mind that there was nothing improper insofar as her having seen the photograph in Mr. Shuker's office."

d. "In view of the fact that the photographic identification is excluded the Court feels that she should not make an in-court identification of the defendant at the time of her appearance here in fear it might be tainted in some way by the recent viewing of the photograph."

e. "In view of the fact that she had seen photographs over a period of time and not made the identification before or at the lineup of the defendants the Court feels that the later identification [of lineup photo] just might be subject to question."

f. "I don't feel there was anything at all improper about counsel's having shown her the photograph or actually her looking it over."

Although the appellees have briefed and argued a Fifth Amendment due process justification for suppression of any in-court identification by Mrs. Edgecomb, the Government contends that an analysis of what District Judge Green said gives absolutely no support to forbidding photographic or in-court identification on *Stovall** due process grounds, that the trial court clearly ruled that the display of the lineup photograph was itself proper, that the trial court impliedly found an independent source for the witness' identification at trial, and that the trial judge's rationale for suppression was simply the absence of defendants' counsel at the viewing of the lineup photograph, which is a Sixth Amendment ground under the rationale of *Wade*.

II. *The Sixth Amendment Right to Counsel in Relation to a Witness' Post-Indictment Photographic Identification of a Defendant*

A. *The Photograph in Question*

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* *Stovall* v. *Denno*, 388 U.S. 293 (1967).

At the outset we note the following:

1. Counsel for both appellees Proctor and Brown were present at the lineup reproduced in the photograph shown to Mrs. Edgecomb.

2. We find no fault or unfairness in this lineup, judging from the picture itself and the testimony concerning it. Neither did the District Court. Brown even now makes no claim of unfairness. On the record it is agreed by both sides that it is unclear whether Proctor's counsel, the same at the lineup as on this appeal, made any allegation that Proctor was the only one with a goatee; it appears in the photograph that the first man on the left, standing next to Proctor, does also have a mustache and goatee. Proctor's only claim to unfairness in the lineup is a possible absence of sufficient goatees.

3. The lineup being fair, the photograph itself provides a fair comparison of nine persons from which Mrs. Edgecomb or any other witness at the robbery could make an identification.

4. The reason Mrs. Edgecomb did not make an identification at the lineup was plainly and clearly stated at the time to those present, i.e., all of the faces, their shapes and complexions, were equally indistinct to her because of the lighting, and she could not fairly make any kind of choice. We take this reluctance to make an identification under these conditions, not as any indication of Mrs. Edgecomb's uncertainty or lack of ability to make an identification under different conditions, but as an indication of Mrs. Edgecomb's desire to be fair and accurate.

5. The witness herself requested, at the time she was leaving the lineup, to see a photograph of the lineup, because she believed she might be able to make an identification of at least one person from a photograph.

6. The Government complied with this request, not immediately after the lineup, but some seven months later,

two weeks immediately prior to trial, as part of its preparation for trial by interviewing the witnesses as to their prospective testimony.

7. The witness herself initiated the discussion of the lineup photograph, without any prompting from the prosecutor or the detective present. She first picked out Proctor as she went down the lineup from left to right, then picked Brown and one other standing next to Proctor (also with mustache and goatee), then finally settled on Proctor and Brown as the two robbers.

B. *The Authorities*

Whatever might be said of another post-custodial photographic identification with a type photo or photos different from that we have in the case at bar, there is little in the rationale of *Wade* which supports the trial judge's action or appellees' position here. Throughout Part IV of the majority opinion in *Wade* there runs a two-factor rationale for the required presence of counsel at a lineup:

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identification.[7]

And,

> There is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. . . . The defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial.[8]

From this Justice Brennan's opinion concluded:

> Since it appears that there is grave potential for prejudice, intentional or not, in the pre-trial lineup,

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[7] 388 U.S. 218, 228.

[8] *Id.* at 230.

> which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] . . . as at the trial itself."[9]

However, prior to the enunciation of this rationale for right to counsel at lineups in *Wade*, the Supreme Court in Part III of its opinion had considered other pre-trial preparatory techniques, and concluded that these were different from the lineup. The Government had urged that the lineup was a mere preparatory step, not different for Sixth Amendment purposes from various other actions, such as scientific analysis of fingerprints, blood samples, clothing, hair, and the like. The Court said:

> We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses in the presentation of the evidence of its own experts. The denial of a right to have his counsel present at such analysis does not therefore violate the Sixth Amendment; *they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate his right to a fair trial.*[10] (Emphasis supplied.)

Obviously the pre-trial photo identification here is not similar to the scientific tests cited by the Court as examples of investigative steps, but we think the same reason-

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[9] *Id.* at 236-37.

[10] Id. at 227-28.

ing—"there is minimal risk that his counsel's absence at such stages might derogate his right to a fair trial"—applies. Since appellants were represented at the lineup by counsel, the lineup itself met the Sixth Amendment requirements of *Wade*. The photograph of that lineup is a completely neutral and wholly exact reproduction.[11] As for the possibility of manipulation by the prosecuting attorney in the showing of the photograph to the witness, we do not think the risk of impeding justice is such—considering the professional responsibilities and status of the prosecuting attorney, and the defense counsel's right of cross-examination—as to require that this phase of preparation for trial by the busy prosecuting attorney be encumbered with attendance by defense counsel who has already attended the identification lineup recorded in the photograph.

There are many different kinds of photographs, and a wide variety of circumstances in which the validity of their use for criminal identification purposes may arise. The case before us involves a very special kind of photograph and a very special set of circumstances giving rise to its exhibition to the witness. To hold that there was no Sixth Amendment violation in this case, we need not, as some courts apparently have, embrace a general principle to the effect that no photographic showing can ever fall

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[11] The dissenting judges accuse us of missing the thrust of *Wade*, in that we do not believe that the *Wade* rationale of the difficulty of reconstruction at trial of the "precise manner and mode of lineup identification" applies to a pre-trial photographic identification, such as we have here. We are of this belief because we do not feel that a pre-trial photographic identification as in this case presents as many elements difficult of reconstruction as does the "little drama" of a lineup itself. See the writer's dissenting opinion in *United States* v. *Ash*, —— U.S. App. D.C. ——, ——, —— F.2d ——, —— (No. 22,340, decided this day).

afoul of the Sixth Amendment for the reason that the right to counsel attaches only to confrontations, and confrontations by definition involve the presence of the accused.[12]

In the case before us there was a confrontation with counsel present. That was the lineup. All we have to decide is whether the subsequent showing of a photograph of that lineup to the witness occurred under circumstances necessitating the presence of counsel. This record shows no such need. Since defense counsel was present at the lineup, the lineup array was fair, and the picture was of the lineup itself, there is thus preserved for reconstruction at trial most of the factors which the Supreme Court in *Wade* felt required the presence of counsel, even by appellees' definition.[13] As for the manner in which the photograph was presented to the witness, all three persons present were subjected to vigorous cross-examination, and no hint of suggestivity or unfairness in the presentation on the part of the prosecution was elicited.[14] Having had the benefit of this pre-trial hearing, defense counsel is now thoroughly prepared for cross-

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[12] See the extensive discussion of these cases by both the majority and dissenting opinions in *United States* v. *Ash*, No. 22,340, decided this day.

[13] "The underpinnings of the *Wade* holding are twofold: First, that the presence of defense counsel may prevent unfairness in the lineup array itself and in the circumstances under which the witnesses view the suspects, and therefore may avert an erroneous identification; and, second, that counsel will be better equipped to cross examine the identifying witnesses at trial because he has been able to observe the identification proceeding and is thus aware of many of the factors relevant to the validity of the identification." Appellees' brief, 24.

[14] The dissenters would favor the presence of counsel at pre-trial identifications such as the one in the case at bar in order to guard against prosecutorial bad faith, or even

examination on this pre-trial photographic identification.[15] The rationale of *Wade*[16] has no application here.

"wholly unintentional nuances which may suggest the 'proper' response." As to the latter, we are far from sure that the presence of counsel can counter or hold in check the unconscious responses of the prosecutor, and as for the problem of "bad faith," while we believe such instances to be very rare, we are certain that an accomplished and hardened prosecutor fatally bent on mischief could easily sway a witness through a hundred subtle or not-so-subtle means. For example, it would be comparatively easy in a lineup or photographic identification for the prosecution to let a witness know in advance the identification number that would be assigned to a defendant the prosecution wished to convict. A counsel present at such a "rigged" identification would have no way of knowing of such a "fix," and his presence would serve as no deterrent. The protection of defense counsel would lie in vigorous cross-examination of the witness, whether counsel had been present or not. Thus we feel that the possibility of prosecutorial bad faith has little relevance to the problem at hand.

[15] The dissenting judges criticize our decision in light of what they see as the great difficulty of reconstruction of the photographic identification at trial, as this difficulty "is substantially greater than an uncounselled lineup, for at least the accused is present at the lineup and can relate what occurred there to his attorney." (Slip op., at 31-32.) It should be pointed out that in the latest police procedures, for instance now in the District, the goal at lineups is to make it impossible for the accused to see the identification procedures, lest there be reprisals against identifying witnesses. Various devices are used to implement this policy, with perhaps the most effective being that used by the Washington police, a one-way mirror behind which the men in the lineup stand, where they may be viewed by witnesses, but may not see them. Furthermore, the comments of witnesses are not audible on the other side of the glass section, and the only communication between the two areas is by telephone between the officer with the witnesses and the officer in control of the subjects in the lineup.

[16] See particularly, 388 U.S., at 231-2, 240-1.

III. *The Fifth Amendment Claim of Denial of Due Process in the Identification Procedure*

A. *Suppression of the Pre-Trial Photo Identification*

1. *The District Court's Ruling*

Among other reasons for suppressing Mrs. Edgecomb's identification of the lineup photo, the trial judge enunciated two which did not relate to denial of counsel: First, that she did not pick the people out at the time of the lineup; and, second, that she had seen photographs over a period of time and had not identified the two defendants in them.[17] This might appear that the court was stating a Fifth Amendment ground for suppression of the pre-trial photo identification. But, before the first statement, between the two statements, and after the second, the trial judge made a finding of fact—"It appears that Mrs. Edgecomb did have an ample opportunity to observe the two defendants while in the store" (2a, *supra*)—and conclusions of law—"There is no question in the court's mind that there was nothing improper insofar as her having seen the photograph in Mr. Shuker's office" (2c, *supra*), and "I don't feel there was anything at all improper about counsel's having shown her the photograph or actually her looking it over" (2f, *supra*)—which completely negate any due process violation.

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[17] As quoted under 2b, *supra* p. 8:

> [I]n view of the fact that she did not pick out the people at the time of the lineup, and with an abundance of caution on behalf of the defendants, the court will deny the use of her identification of the defendants in the photograph at a later time.

And under 2e, supra p. 9:

> In view of the fact that she had seen photographs over a period of time and not made the identification before or at the lineup of the defendants the Court feels that the later identification [of lineup photo] just might be subject to question.

We conclude that the trial court's ruling really rested unambiguously on Sixth Amendment grounds, but whether or not the trial court relied on a Fifth Amendment rationale, there is nothing in the record to support such reliance. The photograph depicted a lineup, which we and the trial court have found to be fair, during which appellees were represented by counsel. Mrs. Edgecomb and Detective Pierson were vigorously cross-examined regarding the 19 May interview, and there is nothing in the record which hints at anything in any way suggestive concerning the manner in which the photograph was presented to Mrs. Edgecomb or any other actions taken to influence Mrs. Edgecomb's testimony.

2. *Appellees' Position*

Appellees' brief makes a Fifth Amendment denial of due process argument as justification for the trial court's suppression of Mrs. Edgecomb's pre-trial photographic identification.

In support of this argument, appellees recite and dwell at length upon the times at which Mrs. Edgecomb did not make an identification of Proctor and Brown. Specifically, on 25 October 1969, when shown ten photographs including both Proctor and Brown, she was unable to identify anyone. On 26 October 1969, she was shown eight photographs, including Proctor and Brown, out of which she "liked" Brown and one other not involved in the crime, but was not at all certain. On 4 November 1969 at the lineup, already discussed in detail, she made no identification, in fact no attempt to pick out anyone because of the reasons previously stated. She did, however, ask for a photograph of this lineup, because she felt that without the glaring lights, the attendant confusion, and the nearby presence of suspected criminals she might identify at least one person in that lineup. On 19 May 1970 she was shown this photograph, and without any suggestion what-

soever proceeded in her own way to identify both Proctor and Brown. Appellees also cite Mrs. Edgecomb's reluctance to talk about the crime with her husband or anyone else as an indication of uncertainty in her identification.

3. *Testimony as to Pre-trial Photographic Identification Admissible*

Appellees interpret Mrs. Edgecomb's hesitancy in firmly identifying the two perpetrators of this murder and robbery as implying a lack of accuracy in her identification and as justifying invalidating her subsequent identification. Neither conclusion is correct. Mrs. Edgecomb's testimony is replete with indications of her awareness of the seriousness of the crime, and of the seriousness of her identification of anyone perpetrating murder. We interpret her hesitancy as the hesitancy of the responsible citizen knowingly performing an important act. It has been frequently observed that, sad to relate, the more glib and self-assured witness sometimes makes a stronger impression on an unsophisticated jury than does a careful and conscientious witness, who registers fairly his certainties and uncertainties on different aspects of his testimony. The appellees urge us to draw the same false conclusion, *i.e.*, take the conscientious effort of Mrs. Edgecomb to be absolutely fair and careful in her identification as the mark of an unreliable or influenced witness, when in fact it is probably the mark of reliability and independence of judgment.

It is significant that the photos shown to the witness in October, allegedly of Brown and Proctor, do not at all resemble the appellees as they appear in the lineup photo. In reliance on both briefs' statement that Proctor's photo was included in each group, we believe Proctor is identifiable in two individual photos, one in each group shown. (Mrs. Edgecomb was *not* told a definite suspect was in either group, and had twice previously been shown many photos in which Brown and Proctor were not included;

she made no identification on either occasion.) As for Brown, there appears one photo in each group that is *similar* to Brown's picture in the lineup, but these two individual photos appear to be of two *different* men.

We draw these conclusions: First, that it is thoroughly understandable why Mrs. Edgecomb made no identification of Brown and Proctor from the individual photos shown her in October. Second, we conclude that neither her identification of Brown and Proctor in the lineup photograph nor her possible identification of the appellees at trial was or would be "tainted" by viewing the individual photos; rather, such identification would be made in spite of such viewing. It follows that appellees' due process violation argument based on repeated showings of photographs of the accused to the witness—on the facts of this case—is not sustainable. And, third, it appears that Mrs. Edgecomb did have an ample opportunity to observe the two defendants while in the store.

To whatever extent the argument about Mrs. Edgecomb's hesitancy in making her identification of Proctor and Brown has validity or affects the strength of her testimony, it is an argument which appellees can make to a jury. But it is not a valid due process argument for suppressing her identification of the lineup photograph.

In considering the admissibility of identification evidence at trial, constitutional infirmities will bar its admission, but testimonial infirmities go only to the weight of the evidence. We start with the principle, well phrased by Judge (now Chief Justice) Burger in a different context but thoroughly applicable here: "When an eyewitness is willing to give testimony, under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard." [18]

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[18] *Brown* v. *United States*, 126 U.S. App. D.C. 134, 375 F.2d 310, at 319 (1966).

B. *Suppression of the In-Court Identification*

1. *The District Court's Ruling*

The only ground advanced by the trial judge for her suppression of the prospective in-court testimony of Mrs. Edgecomb was:

> In view of the fact that the photographic identification is excluded the Court feels that she should not make an in-court identification of the defendants at the time of her appearance here in fear it might be tainted in some way by the recent viewing of the photograph. (2d, *supra*)

Of course, if a pre-trial identification is found to have been obtained in violation of the accused's Fifth or Sixth Amendment rights, the burden is then on the Government to show an "independent source" for any subsequent identification made at trial.[19] A finding that this burden was not met may be inferred from the District Judge's statement quoted above. The opposite can also be inferred from what the District Judge plainly stated at the outset, "It appears that Mrs. Edgecomb did have an ample opportunity to observe the two defendants while in the store," that Mrs. Edgecomb did have an independent source for in-trial identification.

2. *Appellees' Position*

At oral argument appellees' counsel conceded that, without the display of the lineup photograph, Mrs. Edgecomb's testimony would be admissible at trial, for whatever weight the jury might give it.[20]

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[19] *United States* v. *Wade*, 388 U.S. 218, 240-242 (1967); *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969). *United States* v. *Cunningham*, 423 F.2d 1269 (4th Cir. 1970).

[20] At oral argument before the panel the following exchange occurred:

3. *In-Trial Identification Permissible*

On the whole record of the pre-trial hearing, evaluating Mrs. Edgecomb's opportunity to observe at the time of the robbery and murder, the comparative clarity of the lineup photograph and the individual photographs of the accused shown the witness, her care, selectivity and spontaneity in making the identifications in the lineup photograph which she did (coupled with the previous refusal to identify in the other photos), we conclude that the witness Edgecomb had an independent source from which she may attempt an in-court identification of the accused at trial.[21]

We have found that there were no Sixth Amendment right to counsel nor Fifth Amendment due process violations involved in the showing of the lineup photograph to Mrs. Edgecomb. It therefore follows that no showing of an "independent source" is required, although the trial court may be considered to have determined an independent source and on the record we have so determined; hence, any in-court identification by Mrs. Edgecomb will be properly admissible at trial.

Reversed and Remanded.

BAZELON, *Chief Judge*, concurring in No. 22,340 *United States v. Ash* and dissenting in No. 24,452 *United States*

THE COURT: Minus the lineup photograph then you would say that, for whatever it's worth, Mrs. Edgecomb could testify in court?

COUNSEL FOR APPELLEES: It was Judge Green's finding that it was the lineup photograph that did it.

[21] The accused were carefully sequestered from the courtroom while Mrs. Edgecomb was present. She has yet had no opportunity for an in-court identification, and may or may not be able to do so.

v. Brown, Proctor & Williams: Given the complex entanglement of our holding in these cases it is distressingly easy to lose sight of the straightforward propositions on which our decisions should rest. First, identifications are crucial to the fairness and reliability of convictions. No other aspect of the accusatory process creates so much opportunity for miscarriage of justice—for punishment of an innocent man.[1] Second, the safeguard at issue here

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[1] Of course, not all of the problems connected with identifications can be fully cured by requiring the presence of counsel. One critical problem concerns their reliability, yet courts regularly protest a lack of interest in the reliability of identifications, as opposed to the suggestivity that may have prompted them, arguing that reliability is simply a question of fact for the jury. *See, e.g.*, majority opinion in *Brown, Proctor & Williams* at 19. There already exists, however, great doubts—if not firm evidence—about the adequacy and accuracy of the process. Unquestionably, identifications are often unreliable—perhaps consistently less reliable than lie detector tests, which we have in the past excluded for unreliability. *See* Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923); 3A J. WIGMORE, EVIDENCE § 999 at n.2 (Chadbourn rev. 1970). The difference between our approach to polygraph tests and to identifications is, no doubt, attributable at least in part to the perceived differences in our need for the information. We have no difficulty conceiving of a criminal process that operates without the aid of lie detectors, even if we assume that lie detectors might in some instances enhance the process. But it is hard to see how the process could operate without identifications, and we have bravely assumed that the jury is capable of evaluating their reliability.

Even accepting the validity of that balancing approach, it seems to me clear that we need more information about the reliability of the identification process and about the jury's ability to cope with its responsibility. For it should be obvious that we cannot strike a reasonable and intelligent balance if we take pains to remain in ignorance of the pitfalls of the identification process. The empirical data now available indicates that the problem is far from fanciful. *See generally* P.

obviously cannot be subjected to the attack so often leveled at judicial efforts to enforce the Constitution. Even if the convenience of the police were a controlling consideration, by no stretch of the imagination could this safeguard tie their hands or make the apprehension and conviction of criminals more difficult. If the Court were to hold that

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WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES (1965); I. HUNTER, MEMORY 169-75 (1964); H. MUNSTERBERG, ON THE WITNESS STAND 39-69 (1908); R. Yin, Face Recognition: A Special Process? 35-71 (1970) (unpublished dissertation submitted to the Department of Psychology, Massachusetts Institute of Technology). But for a variety of reasons we have been unwilling to face up to the doubts to which this data gives rise. And despite repeated charges and countercharges concerning the accuracy of inter-racial identifications, we have developed a reluctance that is almost a taboo, *cf.* People v. Hearns, 18 App. Div. 2d 922, 923, 238 N.Y.S.2d 173, 174-75 (2d Dept. 1963), against even acknowledging the question, much less providing the jury with all of the available information. The data on this point is unfortunately meager, but it offers at least tentative support for the widely-held, common sense view that whites have greater difficulty identifying blacks than identifying other whites. And it also seems true that blacks can identify other blacks more easily than they can identify whites. *See* P. WALL, *supra*, 122-25; Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOCIAL PSYCHOLOGY 330 (1969); Feingold, *The Influence of Environment on Identification of Persons and Things*, 5 J. CRIM. L., C. & P.S. 39, 50 (1914); *cf.* Seeleman, *The Influence of Attitude Upon the Remembering of Pictorial Material*, ARCHIVES OF PSYCHOLOGY No. 258, at 61 (1940) ("Unfavorable attitude toward the Negro tended to obliterate recognition of individual differences among Negro pictures, whereas favorable attitude tended to heighten recognition of these differences."). More information is needed to assist the jury's resolution of identification issues, and that information may reveal that in some instances questions of reliability should be resolved by courts as threshold questions of law. In any case, our doubts will not disappear merely because we run away from the problem.

counsel must be present at *all* photographic identifications which take place after arrest, even the most zealous critic could not reasonably argue that law enforcement would be hindered.[2]

In fact, the only argument against this safeguard is a vague suggestion that it would be bothersome for the police to telephone the defense attorney and to postpone the identification until he or his designee arrives. Considering the interests of the defendant and the very real possibility that an innocent man will be convicted on the basis of a mistaken identification, I am distressed by the failure to recognize an unambiguous constitutional requirement that counsel must be present at all post-arrest photographic identifications.

Recognizing that a post-arrest photographic identification is a "poor substitute for a corporeal lineup," the Court holds in *Ash* that such an identification is a critical stage of the prosecution at which the presence of counsel is required. But the Court explicitly points out that "[w]e do not consider in this opinion whether or to what extent [the principle of *Ash*] should be applicable in case of a photographic showing subsequent to a lineup."[3]

By means of this limitation, the opinion in *Ash* leaves room for the decision in *Brown*, where the Court validates an uncounseled identification at which the witness was

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[2] Assuming it were clear that the convenience of the police could be raised in opposition to a claim of constitutional right, the appropriate course would be to remand the case to the District Court for an inquiry into the extent, if any, of the inconvenience that would be imposed. Nothing in the record before us even begins to indicate that this constitutional requirement of counsel would impose any discernible burden on the police or prosecution. *Cf.* United States v. Wade, 388 U.S. 218, 237 (1967).

[3] Majority opinion in *Ash* at 22.

shown a photograph of a prior lineup. Yet in neither opinion does the Court convincingly explain why a photographic identification ceases to be a critical stage of the prosecution merely because it comes on the heels of a corporeal lineup. There are, of course, differences between *Ash* and *Brown*. But whether those differences amount to a meaningful distinction is a question answered conclusively in the negative by Judge Wright's dissenting opinion, which I join, in *Brown*.

According to the Court's opinion in *Ash*, the premise of *Brown* is that prosecuting attorneys, given their professional responsibilities and fears of jeopardizing their professional careers, are so unlikely to steer identifications that we should not impose on their busy schedules by requiring the presence of defense counsel at identifications which follow counselled lineups. Majority opinion in *Ash* at 23 n.19; majority opinion in *Brown* at 13. Whatever the force of that reasoning, it clearly does not differentiate *Brown* from *Ash*. In *Ash*, just as in *Brown*, the identification interview was conducted by a prosecuting attorney. And as to the reasoning itself, see, for example, the confessions of a liberal and extremely well-intentioned "prosecuting attorney" in Schrag, *On Her Majesty's Secret Service: Protecting the Consumer in New York City*, 80 YALE L.J. 1529, 1597-98 (1971):

> All of us in the [Consumer] Law Enforcement Division were civil libertarians. We applauded the Supreme Court decision requiring policemen to warn suspects that their admissions could be used against them, and scoffed at police officials who claimed that the case would "hamstring" law enforcement officials. We condemned eavesdropping and wiretapping. We decried the loss of privacy in American life. We demonstrated when police forces took the law into their own hands and beat kids over the head, or when they stood by passively while construction workers did so. We protested the use of informers and secret agents to convict Jimmy Hoffa.

> Yet here we were, after experiencing for only one year the frustrations of law enforcement, eager to emulate every police trick we despised, and indeed, ready to invent a few of our own. By the end of that year we had an impressive inventory of electronic gadgetry, including a subminiature tape recorder with one microphone that looked like a vest-pocket fountain pen and another that hooked onto a bra-strap. We thought of the press as one of a number of arrows for our bow, rather than the safeguard of a free people against oppressive government. We first learned that the government had to lie when we discovered that many subpoenas could not be served unless we used a ruse to get into the presence of a company's officers. By the end of the year, we were routinely engaging in deception to fight deception, and even the use of wired secret agents to infiltrate companies was becoming commonplace.

In fact, of the two cases, *Brown* seems to present the greater danger of prejudice to the defense—and hence the greater need for the protection of counsel's presence. For it is precisely where a photographic identification follows a corporeal lineup, as in *Brown*, that the need for counsel is likely to be most acute. Photographic identifications are, after all, unlikely to follow lineups at which the witnesses successfully identify the suspect. As *Brown* unfortunately demonstrates, it is only where the prosecution is dissatisfied with the results of the lineup that it has a significant interest in making a second effort to obtain a positive identification. And this second attempt imposes the greatest incentive to resort, wittingly or unwittingly, to suggestive practices. Yet there is no discernible reason to conclude that the prior lineup will in any way enhance the fairness of the second, uncounselled attempt to obtain an identification. And it is entirely unclear to me why the presence of counsel at the earlier lineup—which, by hypothesis, failed to yield a positive identification—is thought to immunize the defendant from prejudice at the *second* identification, where the prose-

cution is trying to salvage its case and the risks of suggestivity are therefore maximized.

Accordingly, I dissent from *Brown* because it violates the controlling constitutional standard as announced in *Ash*. And for the same reason I would hold in *Ash* that counsel must be present at all photographic identifications held after the accused is in custody whether or not a lineup has previously been held.[4] Nothing less will satisfy the demands of the Sixth Amendment. And nothing more is needed to satisfy the demands of law enforcement.

WRIGHT, *Circuit Judge*, with whom BAZELON, *Chief Judge*, and ROBINSON, *Circuit Judge*, concur, *dissenting:* In June 1967 the Supreme Court decided a trilogy of "lineup" cases which brought into sharp focus the problem of pretrial identifications. *United States* v. *Wade*, 388 U.S. 218

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[4] It is further regrettable that *Ash* may be thought to leave room not only for *Brown* but also for a considerable extension of *Brown*'s unfortunate result. In *Brown* the prosecution displayed to the witness a photograph of the very lineup which the witness had attended. Yet in *Ash* the Court puts to one side all cases in which a lineup was previously held, no matter what sort of photograph is subsequently shown to the witness. Thus, *Ash* refuses to decide whether counsel is constitutionally required where the witness sees a photograph which is *not* of the prior lineup. My objections to *Brown* apply with the same or greater force to this penumbra of *Brown*. Clearly, *Brown* does not control this question since its ill-conceived holding, which is premised in part on the assumed fairness of displaying a photograph of a previous, counselled lineup, has no application to a case where the witness is shown a photograph that is not of a lineup. I can see no justification for expanding the anomalous exception created by *Brown*, or for launching a further assault on the integrity of the principles established in *Ash*.

(1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *Stovall* v. *Denno*, 388 U.S. 293 (1967). These cases held that a lineup is a critical stage in the criminal process at which an accused is constitutionally entitled to the assistance of counsel. In reaching this result, the Court noted that pretrial identification procedures are "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial," and that "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." 388 U.S. at 228.

The Court therefore concluded that the presence of counsel at lineups is necessary (1) to minimize the likelihood of an unduly suggestive confrontation and (2) to enable an informed challenge to be made at trial to either the admissibility or the credibility of identification evidence. *See Clemons* v. *United States*, 133 U.S.App.D.C. 27, 31, 408 F.2d 1230, 1234 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969). With these considerations in mind, the Court laid down a prophylactic rule that evidence of identification at a tainted pretrial lineup is *per se* inadmissible, and the admission of such evidence is cause for automatic reversal unless shown to be "harmless beyond a reasonable doubt." 388 U.S. at 274.

Recognizing that many of the same dangers inherent in lineup procedures exist also in pretrial photographic

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[1] *See United States* v. *Zeiler*, 3 Cir., 427 F.2d 1305 (1970); P. M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 66-89 (1965); Comment, *Criminal Procedure—Photo-Identifications*, 43 N.Y.U. L. REV. 1019 (1968); Note, *Right to Counsel at Pre-trial Lineup*, 63 NW. U. L. REV. 251, 258 (1968).

identifications,[1] this court in *United States* v. *Ash*, —— U.S.App.D.C. ——, —— F.2d —— (No. 22,340, decided today) (*en banc*), a companion to this case, held the teachings of *Wade* and *Gilbert* applicable to pretrial photographic identifications. The majority here, however, holds that presence of counsel is unnecessary where the identification is based on a fair and accurate photograph of a properly conducted lineup. I cannot agree. Although such a procedure may avoid many of the hazards inherent in other forms of photographic identifications, the potential for prejudice is by no means eliminated. There are two very separate aspects to the problem of suggestion in this context—the fairness of the photographs themselves and the manner in which they are presented to the witness. It may well be, as the majority suggests, that presence of counsel at the lineup will insure the fairness of the photographs. But the fairness of the photographs themselves is wholly irrelevant to the potential for prejudice in the manner in which they are displayed to the witness. Comment, *Criminal Procedure—Photo-Identifications*, 43 N.Y.U. L. Rev. 1019, 1025 (1968). Gestures or comments of the prosecutor at the time of the identification may lead the witness, uncertain at the prior lineup, to select the "correct" defendant. Indeed, the possibilities for suggestion, both conscious and unconscious, are manifold, and the mere fact that the photographs are not themselves prejudicial affords little protection indeed to the unrepresented accused.

The majority argues, however, that photographic identifications conducted by the prosecutor should be judicially acceptable because any dangers that may inhere in such identifications are reasonably guarded against by the professional responsibilities of an attorney. Assuming prosecutorial good faith, however, it can hardly be doubted that a prosecutor is, after all, only human. As such, his behavior may be fraught with wholly *unintentional* nuances

which may suggest the "proper" response.[2] Indeed, the Supreme Court in *Wade* made quite clear that it was concerned not only with intentional misbehavior, but also with the possibility of more subtle, yet equally prejudicial, unintentional suggestive influences. 388 U.S. at 229, 235, 236. These dangers cannot simply be assumed out of existence. Moreover, instances of abuse of prosecutorial discretion are not exactly unknown to the law, and a blanket assumption of prosecutorial good faith is, to say the least, highly questionable.[3]

In a further attempt to justify its result, the majority asserts that the dangers of suggestion and manipulation inherent in this photographic identification session are no greater than the dangers that inhere in any pre-trial witness interview. As this court noted in *Ash*, however, there is a crucial distinction between these two situations. Although the Government is forbidden to introduce testimony on direct of the statements made by a witness at an earlier interview with the prosecutor, no such rule bars admission of the witness' pretrial photographic identification. *United States* v. *Kirby*, 138 U.S.App.D.C. 340, 342 n.2, 427 F.2d 610, 612 n.2 (1970). Moreover, testimony of a witness' pretrial identification is likely to have far more weight with the jury than the taken for granted in-court identification. *Clemons* v. *United States*, *supra*, 133 U.S. App.D.C. at 40, 408 F.2d at 1243. And, as with lineups, once a witness has picked out the accused at a photographic

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[2] *See* Williams & Hammelmann, *Identification Parades, Part I*, [1963] CRIM. L. REV. 479, 483; P. M. WALL, *supra* Note 1, at 26-65; Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 COLUM. L. REV. 94, 98-99 (1966).

[3] It should be noted that in *Ash* the court reversed the conviction because of the absence of defense counsel, even though the identification interview was conducted by the prosecutor.

display, he is unlikely to retract that identification later. As a result, "'the issue of identity may • • • for all practical purposes be determined [at the pretrial confrontation], before the trial.'" *United States* v. *Wade, supra*, 388 U.S. at 229, quoting from Williams & Hammelmann, *Identification Parades, Part I*, [1963] Crim. L. Rev. 479, 482. Thus the potential prejudice to the accused is far greater in the context of photographic identifications than in the ordinary pretrial interview.

Finally, the majority argues that *Wade* is inapplicable here because "all three persons present [at the identification session] were subjected to vigorous cross-examination, and no hint of suggestivity or unfairness in the presentation on the part of the prosecution was elicited." This argument is, however, a master stroke of circularity; it completely misses the thrust of *Wade*. In *Wade* the Court made clear that a prophylactic rule of exclusion was required *because* cross-examination alone could not protect the rights of the accused who was unrepresented at the identification. Noting that an absent defense counsel is seldom able to reconstruct at trial the precise manner and mode of lineup identification, the Court concluded that where "the accused is helpless to subject [the pretrial identification] to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer* v. *Texas*, 380 U.S. 400 [1965]. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus • • • the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the [identification] itself." 388 U.S. at 235.

Moreover, the difficulty in reconstructing at trial an uncounselled pretrial photographic identification is substantially greater than an uncounselled lineup, for at least

the accused is present at the lineup and can relate what occurred there to his attorney.[4] *See United States* v. *Zeiler*, 3 Cir., 427 F.2d 1305, 1307 (1970); *United States* v. *Hamilton*, 137 U.S.App.D.C. 89, 92, 420 F.2d 1292, 1295 (1969); *Thompson* v. *Nevada*, Nev., 451 P.2d 704, 706, *cert. denied*, 396 U.S. 893 (1969); Comment, *Criminal Procedure—Photo-Identifications*, *supra*, 43 N.Y.U. L. Rev. at 1028. And since "witnesses * * * are [not] likely to be schooled in the detection of suggestive influences," 388 U.S. at 230, and consequently cannot be relied on to expose them at trial, the need for presence of counsel is even more compelling in the context of photographic displays. What this court said in *Mason* v. *United States*, 134 U.S.App.D.C. 280, 284, 414 F.2d 1176, 1180 (1969), in a slightly different context, is equally pertinent to our own fact situation:

> "* * * An absence of secrecy * * * is at best a modest benefit if no one is watching. So long as only the policeman and the witness know that an identification * * * is in process, the defendant will be hard put to discover the myriad subtle suggestions which may have passed from policeman to witness. * * *"

Thus while it is true, as the majority argues, that defense

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[4] Because the defendant is not present at the photographic identification, irregularities in the procedure may never come to light. The Government, in *Wade*, expressed the problem clearly:

> "* * * When the defendant is present—as he is during a lineup—he may personally observe the circumstances, report them to his attorney, and (if he chooses to take the stand) testify about them at trial. When the prosecutor interviews a witness in the absence of an accused, on the other hand, there is no one present to verify the fairness of the interview or to report any irregularities. If the prosecution were tempted to engage in 'sloppy or biased or fraudulent' conduct, * * * it would be far more likely to do so when the accused is absent than when he himself is being 'used.'"

Brief for petitioner, at 24-25, *United States* v. *Wade*, 388 U.S. 218 (1967). (Footnotes omitted.)

counsel here was unable to uncover any hint of impropriety in the identification session, we do not know whether this was due to the actual lack of any such impropriety or, rather, to the severe handicap under which defense counsel was required to conduct the cross-examination. *Wade* was intended to eliminate just such uncertainty.

Moreover, the facts of this case demonstrate the need for presence of counsel at photographic displays. Mrs. Edgecomb's identification of the accused came about under what can only be termed "unusual" circumstances. Between June 27, 1969, the date of the robbery, and October 25 of that year, Mrs. Edgecomb selected photographs of several persons other than the defendants as "resembling" the robbers, and on October 25 she failed to identify pictures of both Brown and Proctor. On the following day she again failed to identify a photograph of Proctor, and at the November 4 lineup she was unable to identify any of the defendants. Finally, almost eleven months after the robbery, and shortly before trial, she identified the accused from a photograph of the lineup in the prosecutor's office.

Under the circumstances, the pretrial photographic identification here in question carried a grave potential for prejudice, whether intentional or not, which may not be capable of reconstruction at trial. And since presence of counsel might well have averted the possibility of such prejudice and would have assured a meaningful confrontation and cross-examination at trial, this case presents the precise type of problem that *Wade* sought to avoid. I would hold, therefore, that pretrial photographic identifications —even where the photograph involved is of the lineup itself—are, like lineups, a critical stage of the prosecution at which the accused is constitutionally entitled to the assistance of counsel. This being so, the ruling of the District Court excluding Mrs. Edgecomb's pretrial identification should be affirmed.

I would also affirm the District Court's ruling as to Mrs. Edgecomb's in-court identification of the accused. In *Wade* the Court held that an in-court identification by a witness who participated in a "tainted" lineup must be excluded unless the Government proves "by clear and convincing evidence that the in-court [identification is] based upon observations of the suspect other than the lineup identification." 388 U.S. at 240. Among the factors to be considered in making this determination are the opportunity of the witness to observe during the crime itself, any identification of another person prior to the tainted identification, any failure to identify the accused on a prior occasion, and the lapse of time between the crime and the in-court identification. 388 U.S. at 241. Here, Mrs. Edgecomb observed the robbers, whom she had never seen before, for only a few moments on June 27, 1969, almost a year before trial. She subsequently failed to identify the defendants or their photographs on no less than four separate occasions. Her inability to identify the accused, whether or not due to a desire to be fair, evinces an uncertainty that cannot be lightly ignored.

Moreover, the District Court excluded her in-court identification as "tainted in some way by the recent viewing of the photograph." Implicit in this ruling is a finding that the Government had failed to sustain its heavy burden of showing by "clear and convincing evidence" that the in-court identification was based solely on her recollection of the robbers themselves and was not affected by her subsequent exposure to the defendants and their photographs. In light of the "key role" played by the trial court in determining whether there was an independent source for the identification, *Clemons* v. *United States*, *supra*, 133 U.S.App.D.C. at 38, 408 F.2d at 1241, I see no reason to disturb the District Court's ruling.

I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

No. 22,340 (Criminal 355-66)

UNITED STATES OF AMERICA

v.

CHARLES J. ASH, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, Chief Judge, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges, sitting *en banc*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued en banc by counsel.

On consideration thereof It is ordered and adjudged by this Court en banc that the judgment ----------of the District Court appealed from in this cause is hereby reversed, and this case is hereby remanded to the District Court for further proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

(s) NATHAN J. PAULSON, *Clerk.*

Dated: March 1, 1972.

Opinion by Circuit Judge Leventhal.

Concurring opinion by Chief Judge Bazelon.

Dissenting opinion by Circuit Judge Wilkey.

Dissenting opinion by Circuit Judge MacKinnon.

U. S. GOVERNMENT PRINTING OFFICE : 1972 O - 481-543

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1255

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES J. ASH, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On March 31, 1972, the United States filed a petition for a writ of certiorari to the District of Columbia Court of Appeals seeking review of a decision which held that the presence of counsel for the accused is required at a showing of photographs to witnesses to an offense held after the accused is in custody. The petition noted the existence of a conflict among the nine courts of appeals which had de-

cided this issue and that the rule adopted by the majority in the court below was supported only by the decision of the Court of Appeals for the Third Circuit in *United States* v. *Zeiler*, 427 F. 2d 1305. On April 11, 1972, the Court of Appeals for the Third Circuit, *en banc*, overruled *United States* v. *Zeiler*, *supra*, for reasons similar to those urged in our petition for a writ of certiorari. *United States ex rel Reed* v. *Anderson*, No. 71-1816, set forth in the Appendix, *infra*. While only the District of Columbia Court of Appeals now adheres to the view that counsel is required at photographic displays held after the accused is in custody, a conflict remains to be resolved with respect to an important issue of law.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1816

UNITED STATES OF AMERICA ex rel.
CLEVELAND REED

v.

RAYMOND ANDERSON, Warden,
Delaware Correctional Center,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued en banc January 12, 1972

Before SEITZ, *Chief Judge*, and HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, MAX ROSENN, JAMES ROSEN, and HUNTER, *Circuit Judges*

OPINION OF THE COURT

(Filed April 11, 1972)

ALDISERT, *Circuit Judge*.

In *United States v. Wade*, 388 U.S. 218, and *Gilbert v. California*, 388 U.S. 264 (1968), the Supreme Court applied a constitutional gloss to what theretofore had been an evidentiary rule and held that a post-indictment lineup where the accused was exhibited to witnesses is a "critical stage" requiring the presence of counsel and that otherwise a presumption of impropriety obtains. In the absence of counsel, the prosecution must establish by clear and con-

vincing evidence that any subsequent in-court identification was based upon observations other than the lineup identification. In *United States v. Zeiler*, 427 F.2d 1305 (3d Cir. 1970), this court extended the *Wade* "critical stage" rule to those instances where the prosecution introduces as evidence of guilt a pre-trial photographic identification of the accused which takes place after an accused has been arrested and charged by some judicial officer with the crime. Today we re-examine this holding.

Convicted of armed robbery, Cleveland Reed was given a ten-year sentence, and appealed to the Delaware Supreme Court, where he contended that while he was in custody, the alleged robbery victim made an out-of-court identification of him, without the presence of his counsel. The details of this pre-trial photographic identification were introduced by the State as part of its case. Relying on *Wade* and *Gilbert*, he argued that this evidence was inadmissible. The Delaware Supreme Court refused to extend the reach of those cases to these circumstances and denied relief. *Reed v. State of Delaware*, 281 A.2d 142 (Del. Sup. 1971). When Reed sought relief by federal habeas corpus, the district court ruled that it was duly bound to apply the teaching of *Zeiler*, and granted the writ. 329 F.Supp. 15 (D. Del. 1971). The State has appealed.

Because Delaware's appeal squarely meets the constitutional issue, we agreed to en banc consideration. In so doing, we recognize that the facts in this case would permit us to avoid meeting the substantive issue, deciding this case solely on the question of retroactivity. Indeed, such an approach would, in our view, admit of easy resolution.[1] But we are persuaded that the substantive

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1. *Zeiler* was decided on June 5, 1970. The photographic identification of Reed, which gave rise to this appeal, occurred in August, 1968. Applying the rationale of *Stovall v. Denno*, 388 U.S. 293, 296 (1968), which limited the application of the constitutional rule of *Wade* and *Gilbert* to "only those cases and all future cases which involve confrontations for identification purpose conducted in the absence of counsel after this date [June 12, 1967]," we have

issue is important enough to merit reconsideration of the important, underlying constitutional questions.[2] Thus, we today decide whether there should be continuing viability of the central issue therein stated:

> The considerations that led the Court in *Wade* to guarantee the right of counsel at lineups apply equally to photographic identifications conducted after the defendant is in custody.

427 F.2d at 1307.

Our analysis of *Wade* begins with the observation that this landmark case is not bottomed on the Fifth Amendment. Although Chief Justice Warren, and Justices Black, Douglas, and Fortas would have applied this additional

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experienced no difficulty in limiting the application of *Zeiler* to those out-of-court photographic identifications conducted in the absence of counsel after June 5, 1970. *United States v. Higgins*, —— F.2d ——, No. 71-1092 (3d Cir. March 28, 1972).

2. We do not accept the notion that the *Zeiler* counsel rule would be seldom invoked because it applies only when in-court photographic identification testimony is introduced as primary evidence of guilt. Photographic identification evidence is often offered to discredit or bolster other identification testimony. *See, e.g., United States v. Roth*, 430 F.2d 1137, 1140 (2d Cir.), *cert. denied*, 400 U.S. 1021 (1971). *Cf., United States v. Thomas*, 451 F.2d 760, 763 (3d Cir. 1971). Thus, as prior consistent or inconsistent statements, prior identifications may be held admissible as exceptions to the hearsay rule without violating the Confrontation Clause. See *California v. Green*, 399 U.S. 149 (1970); *United States v. Small*, 443 F.2d 497, 498-499 (3d Cir. 1971). And as we said in *United States v. Barber*, 442 F.2d 517, 527, n.16 (3d Cir. 1971):

> [T]he courts have been generous in the admission of eyewitness identification in order to permit the jury to make its own assessment. The emphasis has been on inclusion of evidence, rather than exclusion; credibility, rather than admissibility. . . . Balancing the liberal admissibility of identification evidence is the commensurate heavy burden placed on the prosecution of proving the identity of the criminal actor by proof beyond a reasonable doubt.

See also, Annotation, "Extrajudicial Identification," 71 A.L.R. 2d 449, 454.

constitutional dimension to the problem, the Court relied solely on Sixth Amendment considerations.[3] Indeed, throughout the Court's opinions in the *Wade* trilogy runs an unabated emphasis on its confrontation clause:

> In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with witnesses against him.

The issue posed in *Wade* was ". . . whether potential substantial prejudice to defendant's rights inheres in the particular confrontation." In focusing on the "confrontation compelled by the State between the accused and the victim and witnesses," 388 U.S. at 228, the Court described lineups and showings as "either form of confrontation," 388 U.S. at 229, and emphasized the difficulty in "depicting what transpires at lineups and other forms of identification confrontations," 337 U.S. at 230. In discussing these problems it referred to "pre-trial confrontations for identification," 388 U.S. at 232, "suggestive influences in the secrecy of the confrontation," 388 U.S. at 235, "meaningful confrontations," 388 U.S. at 236, that "no argument is made . . . that notice to counsel would have prejudicially delayed the confrontations," 388 U.S. at 237.

Indeed, the Court suggested that the necessity for the constitutional rule would be removed if "[l]egislative or other regulations, such as those of local police departments, [were instituted to] eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontations at trial," 388 U.S. at 239.

Thus, while the constitutional underpinnings relate to the broader base of right of confrontations at trial, the actual mischief sought to be avoided was the physical confrontation of an uncounseled defendant with his alleged

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3. A majority of Justices (Brennan, Harlan, Stewart, Clark, and White) expressly held the Fifth Amendment inapplicable. *Wade, supra*, 388 U.S. at 221-223.

victim and other witnesses. Influenced by the dictates of public policy, the Court promulgated a presumption of constructive impropriety or suggestiveness in police lineups and showups, characterizing them as sources of "a grave potential for prejudice, intentional or not." 388 U.S. at 236. This conclusion can be analogized to the presumption of constructive psychological or physical coercion in *Escobedo v. Illinois*, 378 U.S. 478 (1961), and *Miranda v. Arizona*, 384 U.S. 436 (1964), environing the statements taken by the police of those in custody. Because of such atmospheres, the Court has concluded that the potential for harm to the accused can be minimized by the presence of counsel.

In the various Supreme Court articulations of Sixth Amendment requirements of counsel, there appears one omnipresent characteristic common to the diverse fact situations—the physical presence of the accused at the "critical stage": presence at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); presence at confrontation of witness, *Pointer v. Texas*, 380 U.S. 400 (1965); presence at police interrogation after indictment, *Massiah v. United States*, 377 U.S. 200 (1964); presence at the police interrogation in custody, *Escobedo v. Illinois*, *supra*, and *Miranda v. Arizona*, *supra*; presence at preliminary hearings or arraignments, *Hamilton v. Alabama*, 368 U.S. 52 (1961), *White v. Maryland*, 373 U.S. 59 (1963) and *Coleman v. Alabama*, 399 U.S. 1 (1970); presence at sentencing, *Mempa v. Rhay*, 389 U.S. 128 (1967); presence at a juvenile hearing, *In re Gault*, 367 U.S. 1 (1967); and presence at the lineups and showups, *Wade* and *Gilbert*.

No critical stage has been found to exist—at pre-trial or trial—requiring the assistance of counsel in a factual setting where the accused was not physically present and required or entitled to participate by action or inaction. This factual homology emanates not merely from the design of the Sixth Amendment, which created both the right of confrontation and the right to assistance of counsel, but also from a common rationale. "Critical stages" are

those links in the prosecutorial chain of events in which the potential for incrimination inheres or at which the opportunity for effective defense must be seized or foregone. Whether his role be active or passive, the accused must, therefore, be present at all such stages, for neither the prosecution nor the defense can otherwise proceed. And to insure that each proceeds in fairness, "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derrogate from the accused's right to a fair trial." *Wade, supra*, 388 U.S. at 226. This tenet of *Wade* is manifestly inapposite to pre-trial photographic displays, where no actual confrontation of the accused takes place. Because the accused is not present, there need be no concern that he must "stand alone."

Recurring through *Wade* is the Court's concern over the difficulty of reconstructing with fairness and accuracy what actually took place at the lineup or showup: "the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers; in any event, the participants' names are rarely recorded or divulged at trial." 388 U.S. at 230. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." 388 U.S. at 231-232. Those who would evaluate this consideration as supportive of the *Zeiler* rule reason that a photographic identification procedure where the accused is not present is an argument of *a fortiori* proportions: the very absence of the accused or his counsel from the pre-trial proceedings makes it even more difficult for the accused to determine whether suggestive or improper techniques were employed.

Conceding there is logic and merit to this argument, we are nevertheless convinced that it is relatively simple to reconstruct identification by photographs in the presence of the judge and jury. Even on an appellate level, this court

was able to determine in *Zeiler* that the photographic display to the witnesses in the second trial[4] was "deemed so unnecessarily suggestive and conducive to irreparable mistaken identification," and so pointless for any other purpose than suggestion, as to violate due process" to the extent that held that it was "not a permissible conclusion" for the trial court to hold that the government established its burden of proving by clear and convincing evidence that the in-court testimony was not tainted. 427 F.2d 1308. Contrariwise in *Zeiler-II*, after remand, we were able to reach the opposite conclusion in a review of a display of photographs involving other witnesses in the first trial.[5] 447 F.2d 993 (3d Cir. 1971).

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1. William Zeiler was indicted and charged with committing eleven bank robberies in the Pittsburgh area over a period of more than five years. He was tried for ten of these robberies in January, 1968, and was convicted for having committed two of them. A second trial, concluding in June, 1968, resulted in a conviction for the remaining bank robbery. In reviewing convictions from both trials, this court deemed suggestive only the photographs displayed to witnesses in the second trial. Because the record did not disclose what photographs were shown to the identifying witnesses in the first trial, we ordered remand for a hearing on suggestiveness and to grant the government an opportunity to establish an independent origin for the in-court identifications. We reviewed the first trial hearing at 447 F.2d 993 (3d Cir. 1971) (*Zeiler* II).

5. With respect to the first criterion, none of the specific elements of suggestiveness which we found in the photographic array shown to the witnesses at the second trial are present here. Whereas three of the eight photographs in the previous group were of Zeiler, the defendant is only pictured once in the present group of six photographs. All the photographs in the previous group were police "mug shots" except those of Zeiler, which were ordinary snapshots and might easily have reminded the viewers that the "Commuter Bandit" had only recently been arrested, while the present group includes two other pictures besides that of Zeiler which are not "mug shots." Whereas in the previous group only Zeiler was pictured wearing glasses, as had the actual robber, neither Zeiler nor any of the other individuals in the

Indeed, *Wade* and *Gilbert* contain sufficient references suggesting that the court did not consider the photographic identification process as a procedure extremely difficult to reconstruct at trial. *Wade* spoke of "fingerprints, blood sample, clothing, hair and the like," and said that the "variables in techniques [are] few enough." 388 U.S. at 227. *Gilbert* held that the taking of exemplars of handwriting was not a critical stage because "there is minimal risk that the absence of counsel might derogate from his right to a fair trial." 388 U.S. at 267. And as Judge Friendly observed in *United States v. Bennett*, 409 F.2d 888, 898-900 (2d Cir. 1969), *cert. denied*, 396 U.S. 857, *rehearing denied*, 396 U.S. 949:

> . . . in *Wade* itself, the Court listed as one of the ways the prosecution might attempt to show that a witness' identification of defendant at trial was not the fruit of a lineup held in the absence of counsel a showing of "the identification by picture of the defendant prior to the lineup." 388 U.S. at 241, 87 S. Ct. 1926, at 1940, which clearly implies that such identifi-

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Note 5—*Continued*

present group is shown wearing glasses. Furthermore, the identification procedure itself shows no indication of improper suggestion. Each witness was interviewed separately outside the presence of the others; the photographs were arranged in a random order with Zeiler's pictures somewhere in the middle so as not to stand out; and the investigating FBI agent neither suggested that any particular person in the pictures was under suspicion nor commented that the witnesses had picked the "right" man. In contrast with our conclusion concerning the previous group of photographs, therefore, we find nothing to suggest that the attention of each of the witnesses in question was irreparably "focused on Zeiler's picture as identifying the suspect with whom the investigators were concerned."

United States v. Zeiler, 447 F.2d 993, 995-996 (3d Cir. 1971). *See also*, Annotation, "Photographic Identification—Suggestiveness," 30 A.L.R.3d 1000.

cations are permissible even when defendant's counsel is not present.

We turn now to the pervasive concern of the Court—"the vagaries of eye witness identification." We do not minimize the importance of imposing safeguards which the Court described as "peculiarly riddled with innumerable dangers and variable factors." 388 U.S. at 228. Indeed, exercising our supervisory power in *United States v. Barber*, 442 F.2d 517, 528 (3d Cir. 1971), we imposed mandatory jury instructions designed to protect the accused in the trials of federal crimes where factors not conducive to proper identification are not present. This court has always been alert to extend to one accused of crime the optimum of constitutional and procedural protections. We recognize that the exclusionary rule of *Zeiler* brings on collision course the public policy considerations of *Wade* and *Gilbert* and the equally respected consideration that evidence relevant to the truth-finding process should not arbitrarily be withheld from the fact finder; this is especially so where, as here, the evidence traditionally has been regarded as admissible and subject only to the rigorous tests of credibility. At a time when traditional rules of evidence are constantly being subjected to re-examination, and efforts are constantly being made to extend the reach of the exclusionary rule, the determination of whether certain evidence should be placed beyond or within the constitutional pale becomes a task of exquisite agony.

Seeking guidance, as we must, from the Supreme Court, we deem it significant that notwithstanding the formidable analysis of eye witness identification in *Wade*, 388 U.S. 228-239, and official recognition of the possible untrustworthiness of eye witness identification, the Court has enunciated no constitutional inhibitions except those directly intertwined with the concept of confrontation. Insofar as constitutional parameters have been drawn, an eye witness completely unknown to the police prior to trial may walk into a courtroom and properly testify: "I saw the accused do the deed. I never saw him before or since. I only

looked for a second. But I am absolutely, unshakenly positive that he is the man." Other than cautionary instructions concerning the weight to be given his testimony, there is no constitutional barrier to the admission of such testimony, despite the danger of its inherent untrustworthiness.

Finally, in striking the balance between the "desirability of deterring the constitutionally objectionable practice" of uncontrolled police lineups and the "undesirability of excluding relevant evidence," the *Wade* Court stated: "No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel" at lineups, 388 U.S 237, and that "counsel can hardly impede legitimate law enforcement," 388 U.S. 238.

Unlike the circumstances in *Wade*, we believe there are countervailing policy considerations in the use of photographic identification. The brief, *amici curiae*,[6] filed in this proceeding suggests that "the policy reasons against such a rule are overwhelming." After making inferences to the problems inherent in investigating a prison riot, the brief at pages 19-20 states:

> But it is clear that the problems caused by law enforcement officers, witnesses and defense counsel by a blanket prohibition of uncounseled photographic identifications of in-custody defendants is not confined to extraordinary situations such as those involved in the Holmesburg riot. Often the defendant will be in custody at a place far removed from potential witnesses. Although there may well have been probable cause for his arrest, that probable cause may well be based on a description or identification by fewer than all of the available eyewitnesses, and the police are rightly interested in discovering whether the other

6. By the State of New Jersey, Commonwealth of Pennsylvania, Pennsylvania District Attorneys Association, and District Attorney of Philadelphia, joined in by the United States Attorneys for all the Districts in the Third Judicial Circuit.

eyewitnesses corroborate or contradict the original identifications. The only practical way to do so where the defendant is distant from the scene or the witnesses widely scattered, is by photographic identifications. If it would be unduly burdensome on witnesses to bring them to the prison—and this burden is likely to be greatest in wide ranging federal crimes although witnesses to state crimes may also live far apart—the burden on defense counsel to travel from place to place with the investigating detectives if the witnesses are not to be forced to come to the suspect, would be equally great. And, assuming counsel can be forced to accompany the detectives, this would be unduly burdensome on the criminal process in view of the limited number of counsel available to represent defendants at trial, during interrogations and at live lineups, as well as on collateral attack and in the appellate courts.

Other situations under which photographic identification of an in-custody defendant seems highly appropriate include the case of a robber, rapist or burglar with a distinctive modus operandi. When such a defendant is arrested, it is certainly good practice for the police to interview the victims and witnesses to similar crimes. Yet these victims and witnesses are likely to be even more widely scattered than the victims or witnesses to a single criminal event, and the burden of either gathering the witnesses for a lineup or compelling counsel to travel from place to place for photographic identifications will be proportionately greater. Similar appropriate uses of photographs include viewings by victims of robbers, larcenists, or burglars where the defendant has been arrested and is in custody on charges of receiving stolen goods or where fingerprints or other circumstantial evidence is what links the in-custody defendant to the crime.

See also, United States v. Clark, 289 F.Supp. 610, 621 (E.D. Pa. 1968).

We therefore conclude that the principles which dictated the *per se* exclusionary rule in *Wade* and *Gilbert* should not have been made applicable to a pre-trial photographic identification as we did in *Zeiler*. We adopt the Second Circuit's reasoning in *United States v. Bennett*, *supra*:

> If, as here, the identification is not in a live lineup at which defendant may be forced to act, speak or dress in a suggestive way, where the possibilities for suggestion are multiplied, where the ability to reconstruct the events is minimized, and where the effect of a positive identification is likely to be permanent, but at a viewing of immobile photographs easily reconstructible, far less subject to subtle suggestion, and far less indelible in its effect when the witness is later brought face to face with the accused, there is even less reason to denominate the procedure a critical stage at which counsel must be present.

409 F.2d at 900.[7]

We therefore overrule that portion of *Zeiler* which denominated a pre-trial photographic identification as a critical stage requiring the presence of counsel to satisfy the Sixth Amendment.

This is not to say that a defendant will not be protected from inherently suspect identification evidence. As stated by Mr. Justice Harlan in *California v. Green*, 399 U.S. 149, 186, n.20 (1970) (concurring opinion):

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7. See also, *United States v. Long*, —— F.2d ——, 10 Cr.L. 2080 (8th Cir. 1971); *United States v. Fitzpatrick*, 437 F.2d 19, 25-26 (2d Cir. 1970); *United States v. Williams*, 436 F.2d 1166, 1169 (9th Cir. 1970); *United States v. Ervin*, 436 F.2d 1331, 1334 (5th Cir. 1970); *United States v. Von Roeder*, 435 F.2d 1004, 1010 (10th Cir. 1970); *United States v. Collins*, 416 F.2d 696, 699 (4th Cir. 1969); *United States v. Robinson*, 406 F.2d 64, 69 (7th Cir. 1969). *Cf.*, *United States v. Ash*, —— F.2d ——, No. 22,340 (D.C. Cir. March 1, 1972).

Due process does not permit a conviction based on no evidence, *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Nixon v. Herndon*, 273 U.S. 536 (1927), or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court. Cf. *In re Oliver*, *supra*, [333 U.S. 257 (1948)]; *Turner v. Louisiana*, 379 U.S. 466 (1965).

In *Stovall v. Denno*, 388 U.S. 293 (1967), and *Simmons v. United States*, 390 U.S. 377 (1968), the underlying principle was refined. The Court there recognized that evidence of identification—always a critical issue in a criminal trial—should not be received if the circumstances of a pretrial confrontation were so infected by suggestiveness as to give rise to an irreparable likelihood of misidentification.

An examination of the record indicates that a *Simmons* argument on the totality of circumstances, *United States v. Conway*, 415 F.2d 158, 163-164 (3d Cir. 1969), was presented to the district court on the possible impermissible suggestiveness of the photographic display:

> [E]ach case must be considered on its own facts, and . . . convictions based on eyewitness identifications at trial will be set aside on that ground only if the photographic procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

390 U.S. at 384.

Because this issue was presented to the Delaware court which decided it adversely to Reed, 281 A.2d at 147, it was properly before the district court. Expressing no view on the merits of this contention, we will remand the proceedings for a proper resolution of it.

The order granting the writ of habeas corpus will be vacated and the proceedings remanded.

ADAMS, *Circuit Judge*, concurring.

I concur in the result reached by the majority in this matter and approve much of their reasoning. Since I was a member of the panel that heard the first *Zeiler* case, United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970), a short comment may be appropriate.

The concern expressed by the minority opinion regarding the use of photographic displays in the absence of counsel and after an accused is in custody, is one which I share. Moreover, I do not dispute that such an arrangement has a potential for error. However, because so many crimes can be proved only through the use of eye witness testimony, the admission of such evidence should not be unduly restricted. Rather such judicial policy should encourage full utilization of eye witness testimony, tested, of course, in the crucible of trial proceedings.[1]

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1. Chief Justice Burger, then a member of the Court of Appeals of the District of Columbia, stated: "When an eyewitness is willing to give testimony, under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard." Brown v. United States, 126 U.S. App. D. C. 134, 143, 375, F.2d 310, 319 (1967).

Judge Gibbons, in his dissenting opinion, has suggested that because the issue before us is whether the *Zeiler* rule is Constitutionally mandated, we need not go so far as to overrule *Zeiler's* applicability to the federal courts. Implicit in his position is that Zeiler may be preserved on the theory that it represents a valid exercise of our supervisory power. However, I believe that the Court is not completely free to adopt this reasoning, since it was emphatically rejected by the Supreme Court in Simmons v. United States, 390 U.S. 377, 971 (1968):

> ". . . We are unwilling to prohibit [the use of photographic identifications in the absense of counsel] either in the exercise of our supervisory power, or still less, as a matter of constitutional requirement."

Furthermore, Congress enacted 18 U.S.C. §3502 as a direct response to the *Wade* decision. Upon reading this section consistent with *Wade* so as to avoid any Constitutional infirmity, it becomes manifest that Congress was attempting to limit the use of the super-

The problem, as I see it, is that the facts usually presented in cases of in-custody photographic identifications fall between situations exemplified at one end of the spectrum by Simmons v. United States, 390 U.S. 377 (1968), (photographic identification at the investigatory stage), and at the other by United States v. Wade, 388 U.S. 218 (1967) (identification at in-custody corporeal lineup). In-custody photographic displays, being neither one nor the other, present the choice whether the considerations underlying *Simmons* or *Wade*[2] are more applicable.

On reconsideration of the problem posed by *Zeiler*, I am not now convinced that the possibility for error is so great that the protections regarding such a procedure should be molded, solidified and then labelled by a Constitutional *per se* rule that a photographic identification constitutes a critical stage.[3] Nor, in my opinion, has there

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visory power in this situation. See 1968 U.S. CODE CONG. & AD. NEWS 2139 (90th Cong. 2d Sess).

2. Judge Gibbons indicates that considerations behind *Wade* and Gilbert v. California, 388 U.S. 263 (1967), include the "combination of the suggestibility factor and familiar hearsay dangers", whereas Stovall v. Denno, 388 U.S. 293 (1967), "only involves the suggestibility factor." The hearsay point was not raised and argued by the parties here, and because of the posture of this case, we need not decide it. However, I note that in *Stovall*, although the witness was permitted to testify as to both the in-court and out-of-court identifications, the Supreme Court neither addressed itself to the hearsay aspect of the out-of-court identification, nor in any way intimated that the extra-judicial identification implicated hearsay.

3. I am concerned that a logical extention of *Zeiler* would be to apply its holding to a case where the police had probable cause to make an arrest, but delayed in order to facilitate a photographic identification in the absence of counsel. Such a result might induce police to arrest suspects and have counsel appointed prior to the completion of their investigations whenever they had any doubt as to the existence of probable cause in order to arrange a photographic display that would not violate the *Zeiler* rule. A procedure such as this would seem unduly to restrict the proper investigation of crimes rather than to improve it, and might work hardship on persons who were originally suspected but later exoncrated of criminal activity.

been a sufficient demonstration by empirical data that prosecutorial abuse of photographic displays has been so widespread that the *per se* bar advocated by the minority opinion is compelled.[4] In my judgment, the tools forged by the Supreme Court in *Simmons* would appear to be, at least at this point in time, sufficiently effective to provide the essential safeguards and yet comport with due process as implicit in our concept of ordered liberty. *See* United States v. Conway, 415 F.2d 158, 162-164 (3d Cir. 1969). To put it another way, I cannot believe that the use of a photographic display, not "impermissibly suggestive", by an eyewitness to a crime, especially when such witness is later subjected to rigorous cross-examination, runs so counter to the bedrock of our judicial process that the fairness of the resulting conviction would necessarily be vitiated.

Having altered my stance on this issue, I find myself in a similar position to that of Mr. Justice Stewart in Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), and like him, find solace in the words of Mr. Justice Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes too late." Henslee v. Union Planters Bank, 335 U.S. 595, 600 (1949) (dissent). A change of position often brings forth comment, sometimes critical, but devotion to judicial integrity is more important, in my judgment, than the accolade of consistency.

Judge Van Dusen joins in this opinion and in the opinion of Judge Aldisert.

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4. Indeed, the improper conduct which motivated the Court in *Zeiler* has proved to be an isolated incident rather than a general practice. *See e.g.*, United States v. Higgins, —— F.2d —— (No. 71-1092, 3d Cir. 1972); United States v. Bamberger, —— F.2d ——, —— (3d Cir. 1972) (Slip opinion at 3-4); United States v. Medina, No. 71-1330, —— F.2d —— (3d Cir. 1972); *cf.* United States v. Carney, —— F.2d —— (3d Cir. 1972).

SEITZ, *Chief Judge*, concurring with whom Max Rosenn, *Circuit Judge*, joins.

I agree that this case does not involve a violation of the Sixth Amendment right to counsel. Undoubtedly, desirable police practice dictates that an individual in custody be represented by counsel when his picture is included in a pre-trial photographic display. I am not prepared to say, however, that such a desirable practice takes on constitutional proportions.

Simmons v. United States, 390 U.S. 377, 384 (1968), established that the Fifth Amendment rights of a defendant subject to an in-court identification by a witness who had selected the defendant's picture from a photographic array were adequately protected by "a course of cross-examination at trial which exposes to the jury the . . . potential for error." In reaching this decision the Court realized that "[e]ven if the police . . . follow the most correct photographic identification procedures . . . there is some danger that the witness may make an incorrect identification." Id. at 383. Also, it understood that the potential for prejudice accruing to an accused as a result of such a misidentification was magnified because, after selecting a particular photograph, an identification witness "is apt to retain in his memory the image of the photograph rather than of the person actually seen, [thereby] reducing the trustworthiness of subsequent . . . courtroom identification." Id. Both of these factors are inherent in photographic identification procedures, whether or not counsel is present. Yet, the Supreme Court felt that due process required only a case by case determination of the admissibility of an in-court identification which had been preceded by an uncounselled photographic identification.

The same considerations involved in the *Simmons* rule in a Fifth Amendment context apply to the Sixth Amendment challenge raised in this case. It is true that a defendant and his counsel are not privy to what happened at the pre-trial photographic identification. But, much if not

all of what occurred can be reconstructed by appropriate discovery and through examination by defense counsel. Thus, it would appear, as was true in this case, that a defendant can obtain production of the photographs employed in the photographic identification. Compare Del. Super. Ct. Crim. R. 16(b) with F. R. Crim. P. 16(b); cf. Simmons v. United States, supra at 388; but see Jones v. State (Md.) 270 A.2d 827, 830 (1971). With these photographs produced the defense then is left to concentrate largely on the manner in which they were presented to the identification witness. These circumstances do not seem so impervious to effective cross-examination to mandate automatic exclusion of the witness' in-court identification (absent independent basis) as the only acceptable solution. See Simmons v. United States, supra at 384.

Indeed, if a trial court should find that a particular pretrial photographic identification violated *Simmons* it would be required to exclude such identification testimony unless the prosecution established according to the requisite standard that the in-court identification had a basis independent of the prior improper photographic identification. See, e.g., United States v. Sutherland, 428 F.2d 1152, 1155 (5th Cir. 1970); United States v. King, 321 F. Supp. 614, 615-16 (W. D. Tex. 1970); United States v. Washington, 292 F. Supp. 284 (D.D.C. 1968). And, even if not excluded the identification evidence might be seriously impugned. See Simmons v. United States, supra at 384. Thus, although a per se exclusionary rule under the Sixth Amendment is not adopted, I think that a defendant's basic rights in this area are adequately secured by the safeguards enunciated in *Simmons*.

HASTIE, *Circuit Judge*, with whom GIBBONS, *Circuit Judge*, joins, concurring in part and dissenting in part.

The photographic identification of appellant Reed occurred in August 1968. Since the argument of this appeal, this court has decided that the requirement of counsel at eyewitness photographic identification of persons in

custody and charged with the crime in question is to be enforced prospectively from June 5, 1970. *United States v. Higgins*, No. 71-1092, decided March —, 1972. For that reason only, I concur in the court's disposition of this appeal.

However, the majority opinion undertakes to decide "whether there should be continuing viability" to the carefully considered legal conclusion of our unanimous court less than two years ago in *United States v. Zeiler*, 1970, 427 F.2d 1305, 1307, that the "considerations that led the Court in [*United States v.*] *Wade* to guarantee the right to counsel at lineups apply equally to photographic identifications administered by public officers after the defendant is in custody" and after a judicial officer has found probable cause to hold him for prosecution. In the view of the majority, our *Zeiler* holding does not merit "continuing viability." I disagree.

The basic constitutional right to due process of law and the generalized assurance of fair trial that it affords underlie the more particularized criminal procedural safeguards that also are set out in the Bill of Rights. Thus, when question arises concerning the reach of the right to the assistance of counsel in a particular context, a fundamental testing consideraiton is the need for and value of the assistance of counsel at that stage of the prosecution in order to assure fairness in the trial that will follow.

Ever since *Powell v. Alabama*, 1932, 287 U.S. 45, it has been recognized that the assistance of counsel for a period before trial—how long and on what occasions to be determined by the circumstances of the case—is essential to the guarantee of fair trial. Accordingly, in *United States v. Wade*, 1967, 388 U.S. 218, Mr. Justice Brennan began his analysis of the right of an accused to counsel at a lineup by quoting the Sixth Amendment mandate that "the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defense*" (emphasis Justice Brennan's) and, in so doing, pointed out that "this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defense.'" 388 U.S. at 225. He then proceeded

to explain at length why the Court believed that, to assure a meaningful defense, one accused of and judicially charged with an offense needed the assistance of counsel whenever he should be exhibited to an eyewitness of the alleged crime with a view to his identification as a participant in the wrongdoing. 388 U.S. at 228-36.

In the companion case of *Gilbert v. California*, 1967, 388 U.S. 263, the Court held that one essential remedy for the failure of the prosecutor or the police to enable the accused to have the assistance of counsel at a pre-trial lineup is the exclusion from the prosecution's case of evidence that an eyewitness had identified the accused in an uncounseled lineup. Thereafter, in *United States v. Zeiler, supra*, we held that in logic the same considerations and the same exclusionary rule applied to evidence that, in the absence of defense counsel, an eyewitness had identified the accused from a photograph or photographs exhibited to him by the police or the prosecutor.

By majority vote of its entire membership this court is now overruling that decision. In so doing, the court does not seem to challenge the need of the accused for the assistance of counsel on an occasion arranged by the government for purposes of eyewitness identification or the value of such assistance in facilitating the subsequent fair trial of the issue of identification before a judge and a jury. Nor is it urged or in any way demonstrated that the need for or the value of such assistance is less when identification is made from photographs than when it is made during a corporeal lineup.

Rather, the majority opinion focuses upon the distinction that the accused himself is present at a corporeal lineup but absent from a photographic exhibition. In *Zeiler* we pointed out that this distinction, if significant at all, only makes the need for counsel even greater at a photographic identification than at a lineup. For at least the accused, because of his presence, has some knowledge of what happens at a lineup. In contrast, the defense must depend entirely upon the officials who exhibited the photo-

graphs or other prosecution witnesses for evidence of what happened at an uncounseled photographic identification. True, the photographs allegedly used at the pretrial identification may be available at trial. However, only persons present at the identification would know how the photographs were exhibited and what was said on that occasion. But apart from this consideration, it is difficult to see why this distinction should lead to an opposite conclusion as to the right to counsel.

In the view of the majority the key legal concept is "confrontation," its presence in lineup cases and its absence in photographic identification.[1] But in neither situation is the accused complaining of any denial of his constitutional right to be confronted by the witnesses against him.[2] Why then should the occurrence or the absence of a physical confrontation make any difference in deciding whether the accused is entitled to the assistance of counsel on an occasion arranged by his accusers for the accomplishment of eyewitness identification?

The majority opinion points out that in *Wade* Mr. Justice Brennan repeatedly characterized a lineup as a "confrontation." Therefore, the majority reasons, the Court was treating the physical confrontation of accused and witness as the circumstance that made a lineup a "critical stage" of the prosecution and thus entitled the accused to the assistance of counsel. But if this had been what made the lineup a critical stage of prosecution, it is hard to believe that the court would not have made explicit and would not have undertaken to justify so important a conclusion. Instead, as already pointed out, the Court

1. This analysis was suggested by Circuit Judge, now Chief Judge Friendly. *United States v. Bennett*, 2d Cir. 1969, 409 F.2d 899. Other courts have followed Judge Friendly's distinguished leadership without critical comment. *United States v. Serio*, 6th Cir. 1971, 440 F.2d 827; *United States v. Long*, 8th Cir. 1971, 449 F.2d 288; *United States v. Williams*, 9th Cir. 1970, 436 F.2d 1166.

2. This is not to deny that an offer of hearsay evidence of a pretrial uncounseled photographic identification might create a problem under the confrontation clause.

devoted eight pages in its opinion, 388 U.S. at 228-36, to a demonstration of the decisive impact of eyewitness identification and the great danger of misidentification as the factors that made this a critical stage of the criminal proceeding. Moreover, Mr. Justice Brennan referred early in his opinion to *Powell v. Alabama*, *supra*, as establishing the right to the assistance of counsel to the extent needed before trial for proper preparation of whatever defense the accused might have. Obviously, such preparation will rarely involve "confrontation."[3] The occasion of a prosecution supervised photographic identification is simply one of the pre-trial situations in which the need for the assistance of counsel is very great.

The contention that physical "confrontation" is a measure of "critical stage" of prosecution in the present context can be tested impressively by stating certain facts of a recent case. In *United States v. Collins*, 4th Cir. 1969, 416 F.2d 696, an accused prisoner was required to stand with others in a lineup in order that eyewitnesses to the crime might attempt an identification. One eyewitness did not attend this viewing. However, the police photographed the lineup and later showed that picture to the absent eyewitness. Let us assume that counsel for the accused was not notified of or in attendance at either the lineup or the subsequent exhibition of a photograph of the lineup.[4] *Wade* and *Gilbert* would prohibit the prosecution from using as evidence the fact that one eyewitness had identified the accused at the uncounseled lineup. Today's decision would permit testimony that a second eyewitness had identified the the accused at a showing of a photograph of

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3. This right to counsel for pre-trial preparation makes unpersuasive the majority statement that no critical stage has been found to exist "requiring the assistance of counsel in a factual setting where the accused was not physically present. . . ."

4. Only in this respect do the stated facts differ from those of the *Collins* case. There counsel attended the lineup but was not informed of the subsequent exhibition of the photograph of the lineup to another witness.

that lineup. In logic and in fairness, I do not see how those opposite conclusions can stand together. Yet, such is the result of relying upon physical "confrontation" as the touchstone of this problem. Indeed, under the majority view, the police could make *Wade* and *Gilbert* wholly ineffective merely by conducting lineups without the attendance of either witnesses or counsel, photographing the lineups and thereafter, at convenience, exhibiting the photographs to eyewitnesses in the absence of the accused and counsel. To me, the conclusion is inescapable that the *Wade* and *Gilbert* rationale should control both corporeal viewings and photographic exhibitions or neither.[5]

Apart from analogy to *Wade* and *Gilbert* and from considerations of fairness to the accused, the majority opinion also expresses concern that a requirement of counsel at photographic identifications might at times be impracticable or at least would impose undue burdens upon investigators and prosecutors. This view is supported by reference to and lengthy quotation from a brief filed *amicus curiae* in this case by state and local prosecutors who view the *Zeiler* rule with alarm. However, the principal example cited in that brief to show the intolerable consequences of *Zeiler* gives *Zeiler* much broader application than this court intended. We spoke in *Zeiler* of the right of a defendant "in custody" to the assistance of counsel at a photographic identification. We intended, as we think the context shows, to extend the rule only to those defendants who had been charged with the crime in question and thus were being held for further prosecution.

The example cited is a serious prison riot that occurred in Philadelphia in 1970. The brief states that "[i]n order to assure fairness, some twenty books containing the photographs of every person present at the riot scene (several hundred in all) were prepared and given to twenty detectives who in turn interviewed each of the possible witnesses—

5. While the *Wade* majority do not discuss the application of the doctrine of the case to photographic identification, the dissenters point out that in logic it does apply. 388 U.S. 250-51.

guards and prisoners alike—to put together information, which would help to reconstruct the events of the riot and, eventually, *to form the basis for charges against those responsible.*" (Emphasis added). This then on its face was a case of using photographic identification as a proper tool of preliminary investigation in order to determine which prisoners should be charged with the crime in question. No riot connected charge had yet been lodged against any prisoner. No magistrate had found probable cause to prosecute any individual. Not only had prosecution for rioting not reached a "critical stage," prosecution had not even begun.

The brief also suggests that the *Zeiler* rule is impracticable where eyewitnesses to the alleged crime have scattered to various places far from the place where the prisoner is confined, has been charged and is represented by counsel. It may be onerous to require counsel representing an impecunious defendant to travel around the country to be present at showings of his client's picture to such witnesses. But, in *Wade*, Mr. Justice Brennan anticipated this difficulty and suggested that it could be surmounted by "substitute counsel" designated for the limited purpose of representation at the showing of photographs. In these days when criminal defender organizations abound and the bar generally is increasingly sensitive to its obligation to assist in the defense of persons charged with crime, the recruitment and assignment of substitute counsel for this limited purpose will rarely be difficult or burdensome.

Next, it is suggested that fairly often it is desirable to check the possible connection of a person, who has been arrested and charged for one offense, with similar crimes committed at other times and places. To that end, it frequently is worthwhile to exhibit photographs of the prisoner to numerous widely dispersed eyewitnesses of other crimes. But here, as in the case of the riot already discussed, the prisoner is not yet being prosecuted for any of these similar crimes. The *Zeiler* rule is inapplicable to

such photographic exhibition during investigation preliminary to possible charging. Thus, the *Zeiler* rule, as intended by this court and explained in this opinion, would not impose any of the hardships feared and contemplated by the *amici curiae*.

Finally, the alleged hardship of the *Zeiler* rule is minimized by the fact that the prosecution will rarely have serious need to use the fact that an eyewitness made a pre-trial photographic identification as an important part of its case against the accused. For ordinarily the eyewitness will be available to attempt a much more satisfactory face to face identification at trial. Occasionally an important eyewitness will have died before trial. More rarely, the accused may have been identified by photograph shortly after the alleged crime but have changed in appearance so greatly since that time that he is unrecognizable at trial.[6] In these unusual situations where the prosecution's case really turns on evidence of pre-trial photographic identification the preservation of the *Zeiler* rule would afford the accused just and reasonable protection against the inherent grave risk of mistake in eyewitness identification that Mr. Justice Brennan elaborated in his *Wade* opinion without imposing an unreasonable burden on the government.[7]

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6. See *United States v. Collins*, *supra*.

7. Two judges who joined in the *Zeiler* decision now join in overruling it. In a concurring opinion they explain that their change of opinion has been caused by a reweighing of underlying policy considerations. But the policy considerations that in the Supreme Court's view required *Wade* and *Gilbert* have equal force here. And we are obligated to treat *Wade* and *Gilbert* as authoritative. Therefore, if those decisions do not control this case it must be, not because we think the policy underlying them is unsound, but because a photographic identification of an incarcerated accused, different from his identification at a lineup, is not a critical stage of prosecution. The majority opinion recognizes that this distinction must be validated if *Zeiler* is to be overruled. The concurring opinion does not mention this issue, much less contribute to its resolution.

For these reasons, the rule of the *Zeiler* case should be reaffirmed, though its restriction to identification made after its announcement would require a reversal of the district court's decision in this case.

GIBBONS, *Circuit Judge*, dissenting in part with whom HASTIE, *Circuit Judge*, joins.

I concur in Judge Hastie's opinion. Because it seems to me that discussion of the problem of *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967) and *Stovall v. Denno*, 388 U.S. 293 (1967), in terms of "confrontation" and "critical stage" has been the source of some confusion to bar and bench alike, I add some thoughts of my own. These probably will compound rather than dispel the confusion, but in any event I will try.

In the *Wade-Gilbert-Stovall* trilogy the Supreme Court deals with two separate evidence problems. The first is the inherent suggestibility and hence inherent unreliability of eyewitness identifications. The second is the hearsay problem of the use of a prior out-of-court statement—the prior identification—for the truth of the matter asserted. *Stovall* only involves the suggestibility factor. *Wade* and *Gilbert* involve the combination of the suggestibility factor and familiar hearsay dangers. In *Wade*, prior lineup identification was elicited from witnesses on cross-examination in an attempt to impeach their credibility. 388 U.S. at 220. In *Gilbert*, as here, the local law of evidence permitted the use of the prior out-of-court identification for the truth of the matter asserted. 388 U.S. at 272, n. 3. The Supreme Court found that the combined dangers were just too much for use in a criminal trial unless the additional safeguard to reliability of presence of counsel was added. The

8. Since the argument of this appeal the Court of Appeals for the District of Columbia Circuit, by a majority vote of the court sitting en banc, has adopted the *Zeiler* rule. *United States v. Ash*, No. 22,340, decided March 1, 1972, —— F.2d ——.

semantic route which the Supreme Court took in arriving at the judgment that this result is constitutionally mandated now tends to obscure the fundamental reasons for the rule. *Wade* is an exclusionary rule directly related to reliability of the evidence, and hence to the integrity of the fact finding process. This is not a prophylactic rule. *Compare, e. g. Mapp v. Ohio*, 367 U.S. 643 (1961).

I agree with Judge Hastie that it is impossible to distinguish the photographic identification problem from the corporeal identification problem. The use of a prior photographic identification for the truth of the matter asserted combines the same elements of possible unreliability as does the use of prior corporeal identification.

Moreover, some language in Judge Aldisert's opinion goes much further in authorizing use of prior photographic identifications for the truth of the matter asserted than I think appropriate. This is a state habeas corpus case. Thus it presents only the issue whether the rule of *United States v. Zeiler*, 427 F.2d 1305 (3d Cir. 1970) is constitutionally mandated, and thus binding on the state courts. *Zeiler* was a federal prosecution. There is no need, in this case, to overrule *Zeiler's* application in the United States District Courts. Indeed I believe that use by the Government of a prior identification for the truth of the matter asserted violates the rule of evidence which we held to be applicable for the federal courts under our supervision in *United States v. Small*, 443 F.2d 497 (3d Cir. 1971). *See also United States v. Schwartz*, 390 F.2d 1 (3d Cir. 1968); *Government of the Virgin Islands v. Pondt*, No. 71-1395 (3d Cir., filed Mar. 6, 1972). Because of the hearsay dangers discussed by Judge Rosenn in *United States v. Small, supra*, I would not permit the Government to use a a prior identification for the truth of the matter asserted. The prior identification or failure to identify would, of course, be available for impeaching purposes. Nothing in Title II, §701(a) of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 18 U.S.C. §3502, purports to prevent us from excluding affirmative use of out-of-court identifications.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1255

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES J. ASH, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. App. A)[1] are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1972 (Pet. App. C). The petition for

[1] "Pet. App." refers to the appendix of the government's petition for a writ of certiorari; "S.App." refers to the appendix contained in our supplemental memorandum.

a writ of certiorari was filed on March 31, 1972, and was granted on June 12, 1972 (App. 133). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Sixth Amendment, a defendant in a criminal case is entitled to the presence of counsel at a pre-trial showing of photographs to prospective witnesses.

STATEMENT

After a jury trial with one Bailey in the United States District Court for the District of Columbia, respondent was convicted in May 1968 on five counts charging him with having participated in the armed robbery of a federally insured bank on August 26, 1965 (18 U.S.C. 2113(a); 22 D.C. Code 2901).[1] He was sentenced to imprisonment for five to fifteen years. The court of appeals sitting *en banc* reversed the conviction 5-4, on the ground that respondent had been denied his Sixth Amendment right to counsel at a showing of photographs by an F.B.I. agent to prospective witnesses after indictment and shortly before the trial.

1. On August 26, 1965, a gunman entered a branch office of the American Security & Trust Company in the District of Columbia. He waved his gun into the air and ordered everyone not to move. Sec-

[1] Bailey was acquitted by the court after the jury failed to return a verdict.

onds later another man dashed through the bank lobby to the tellers' cages, scooped up some money, and ran out, followed by the gunman. Both the gunman and his accomplice wore stocking masks which covered portions of their faces. The robbery lasted three or four minutes (App. 78-79, 85-86, 89, 91-92, 97-98).

On February 3, 1966, F.B.I. agents interviewed three individuals, Mrs. Paugh, Mrs. Major, and Mr. Taylor, who were eye-witnesses to the robbery, and Mrs. Apple, who had been seated in a car outside the bank and who had seen the robbers unmasked before they entered and after they left the bank (App. 11). At the time of these interviews no arrests had been made. The agents showed each of the witnesses five black and white facial "mug shots" of Negro males, of approximately the same age, height and weight (App. 12). Each of the four witnesses selected the photograph of respondent as the gunman, although none of the witnesses was positive about the identification (App. 11, 50).[3] Only Mrs. Apple selected a photograph of Bailey as the accomplice (App. 11, 50).

The trial began on May 8, 1968.[4] On the day be-

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[3] Apparently, respondent's photograph was included because of information received from an informant (Pet. App. A, 4a-5a).

[4] The long delay in trial was due to a number of factors. Respondent filed numerous *pro se* motions, changed counsel four times and underwent two psychiatric examinations to determine his mental competency. The trial was also continued

fore, an F.B.I. agent together with the prosecutor visited Mrs. Paugh, Mrs. Major and Mrs. Apple. The prospective witnesses were shown five color photographs, including one of respondent and Bailey. Only the picture of respondent and Bailey were full length and bore police identification numbers. Each of the witnesses picked out respondent's photograph as resembling the gunman but again none of the witnesses was able to make a positive identification and none of them selected Bailey's photograph (App. 29-31, 33-34). The next morning, prior to trial, the agent showed the same set of photographs to Mr. Taylor, who could not make an identification (App. 31). A lineup was not held. Defense counsel was not present at the photographic display on May 7 and 8, 1968.

The district judge held a pre-trial hearing to determine the admissibility of the prospective identification testimony. Without deciding whether the showing of the color photographs was impermissibly suggestive, the judge ruled that the government had established by "clear and convincing evidence" that the in-court identifications had an independent basis and therefore could be made in the presence of the jury (App. 63-64). At the trial, Mrs. Paugh, Mrs. Major, and Mr. Taylor were only able to identify

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several times because of the unavailability of government counsel (Pet. App. A, 4a, n. 3). The court of appeals declined to decide, due to the inadequacy of the record, whether respondent had been denied his right in a speedy trial (Pet. App. A, 26a). The court directed that a hearing on this issue be held prior to any retrial (Pet. App. A, 26a).

respondent as the gunman, although they testified that they were not absolutely sure of the identification (App. 79-80, 85, 89-90, 93). Mrs. Apple positively identified both respondent and Bailey (App. 99, 110).[5]

The original photographic identifications of respondent on February 3, 1966, were brought out in the pre-trial hearing but never came before the jury at trial. The showing of colored photographs to the four eye-witnesses was not brought out during the government's case. The defendant Bailey, however, called the F.B.I. agent who had shown the photographs to Mrs. Apple, the only witness who positively identified both respondent and Bailey at the trial. After the agent testified that Mrs. Apple identified one of the color photographs (a photograph of respondent) "as the man who was engaged in the hold-up" (App. 127) and had failed to identify the person in one of the other color photographs (a photograph of Bailey), Bailey's counsel offered Bailey's photograph (Defendant's Exhibit No. 4) into evidence (App. 127).

The prosecutor then asked that the photograph of respondent, which Mrs. Apple said she identified, also be admitted into evidence. Respondent's counsel objected to the admission of this photograph (App. 128). Bailey's counsel then withdrew the offer. Sub-

[5] The government also introduced testimony from one McFarland, an informant, that respondent had asked him to help rob the bank, and that the day after the robbery respondent had told him that he robbed the bank with Bailey.

sequently both the prosecutor and counsel for Bailey again asked that the two photographs be admitted (App. 130). Although respondent's counsel again indicated that he opposed this (App. 130), all five photographs shown by the agent to Mrs. Apple on May 7, 1968, were admitted on stipulation of counsel, after the trial court indicated he would admit them regardless of whether Bailey's counsel or the prosecutor offered them into evidence (App. 130-131).*

2. The court of appeals declined to decide whether the showing of the color photographs was impermissibly suggestive and whether the district court's finding that the witnesses had an independent basis for their identification testimony was correct (Pet. App. A, 10a-11a). While noting that it would, if necessary, have remanded the case for "a more thorough hearing and more definite findings" on the former issue and for further "elucidation by the trial court of the basis of its ruling" on the latter issue (Pet. App. A, 11a, 25a, n. 20), the court ruled that reversible error had occurred in the admission of evidence of the identification made from the color photographs. In reaching this conclusion, it held broadly that, under the principles of *United States* v. *Wade*, 388 U.S. 218, an accused in custody, subject to cer-

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*The majority and dissenting judges below disagreed whether respondent's counsel had initially raised a proper objection to the introduction of all five photographs, and whether respondent's counsel waived any threshold objection by agreeing to the stipulation that all five photographs would be admitted (Pet. App. A, 7a, 63a-65a).

tain possible limitations, has the right to have counsel present at a government display of photographs to prospective witnesses of the offense for which the accused is in custody (Pet. App. A, 14a).[7] The court ruled that on retrial, therefore, the government would have to establish "by clear and convincing evidence" that the in-court identification of each witness was "based upon observations of the suspect" other than at the photographic displays. *United States* v. *Wade*, *supra*, 388 U.S. at 240.

SUMMARY OF ARGUMENT

In *United States* v. *Wade*, 388 U.S. 218, this Court held that a defendant in a criminal case is entitled to the assistance of counsel at a "confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit [an] identification," 388 U.S. at 288. Confrontations at lineups were found to be peculiarly susceptible to suggestive influences which create a grave risk of mistaken identification. Since these suggestive influences are often present in "many subtle ways," it is ordinarily impossible for a defendant to attack the in-court identification by demonstrating to a judge and a jury

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[7] The possible exceptions mentioned by the court were (1) where the delay in securing the attendance of counsel would jeopardize the progress of a continuing investigation or (2) where the photographic showing comes after a valid lineup or other confrontation consistent with *Wade* (Pet. App. A, 98a). See *United States* v. *Hines*, 455 F. 2d 1317 (C.A.D.C.); *United States* v. *Brown*, No. 24,452, opinion filed March 1, 1972 (C.A.D.C. *en banc*) (Pet. App. B).

any impropriety which may have been present at the lineup. 388 U.S. at 229-230.

Neither of the two bases of decision in *Wade*—that the lineup involves a stage of the prosecution in which (1) the accused is a participant, and in which (2) the presence of counsel is necessary to preserve his right to a fair trial—is involved in identification.

A. There are substantial differences between a forced confrontation at a lineup and a display of photographs to a witness. At a line-up there is a clear potential for improper suggestion in the lighting used, the demeanor, appearance, and physical characteristics of the other participants as compared with the accused, the clothing worn by the accused as well as the words he may be required to speak. The inability of unschooled witnesses and uncounseled defendants to detect "suggestive influences" under these circumstances is apparent, 388 U.S. at 230.

A photographic display does not involve the kind of subtle and undetectable influences present at a lineup. At such a display the accused is not present and the witness observes only static poses of the subjects in an atmosphere not marked by the tension present during an emotional confrontation with the defendant. While a photographic display may also be subject to subjective influences, arising out of the nature of the photographs used in array or suggestive comments by law enforcement officials, any impropriety present can easily be reconstructed by preserving the photographs and examining the witness. Accordingly, all the courts of appeals which have

decided the issue, with exception of the Court of Appeals for the District of Columbia Circuit, and the overwhelming majority of State appellate courts, have held that the holding in *Wade* is inapplicable to photographic displays.

B. The second factor common to all cases which have extended the Sixth Amendment's guarantee to various pre-trial stages—the need for the presence of counsel to insure the defendant a fair trial—is also lacking here. The photographic display essentially involves only an interview between a law enforcement officer with a witness; the interview does not involve a "confrontation compelled by the State between the accused and the victim or witness" (*Wade*, 388 U.S. at 228).

The Sixth Amendment guarantee of counsel does not apply to such interviews with witnesses at which the defendant is not present and has no legal right to participate. The cases expanding the right to counsel guarantee have emphasized "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463. While the right to counsel has been extended to formal and informal pretrial proceedings at which the accused is a participant and in need of counsel to assist him in exercising his rights, no case has yet held the Sixth Amendment applicable to proceedings at which the defendant is not a participant.

There are no compelling reasons requiring such an extraordinary expansion of the Sixth Amendment to interviews with witnesses at which photographs are displayed. While such displays may be subject to suggestivity which may improperly influence an in-court identification, they are no more subject to impropriety than ordinary interviews with key prosecution witnesses. Moreover, given the availability of the photographs and the opportunity to cross-examine witnesses at pre-trial hearings with respect to what took place when the photographs were displayed, there is far less potential for impropriety going undetected in such cases than in cases involving improper suggestion at interviews which do not involve photographic displays.

ARGUMENT

The Sixth Amendment does not require that counsel be present at a pre-trial photographic identification procedure

The Sixth Amendment mandate that in all criminal prosecutions the accused shall "enjoy the right * * * to have the [effective] assistance of counsel for his defense" has been held applicable not only to the trial itself but to "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224; *Hamilton* v. *Alabama*, 368 U.S. 52, 54; *Massiah* v. *United*

States, 377 U.S. 201.* The right to counsel has thus been held applicable to post-indictment interrogations (*Massiah* v. *United States*, *supra*) and "confrontation[s] compelled by the State between the accused and the victim or witnesses to a crime to elicit [an] identification." *United States* v. *Wade*, 388 U.S. at 288. These instances are limited exceptions which this Court has permitted to our adversary system of criminal law enforcement under which the government conducts its preparation for trial without participation by defense counsel.

The court below created another exception which we believe to be unwarranted. It held that the pretrial photographic display here "was like a lineup * * * a critical stage of the prosecution, requiring the presence of counsel for Ash, within the meaning of *Wade*" (Pet. App. A, 12a). The court's characterization of the photographic display as a "critical stage" of the prosecution reflected, we believe, a basic misapprehension of the nature of photographic identifications, the crucial differences which distinguish this procedure from a lineup, and an erroneous view of the reach of the Sixth Amendment's right to counsel guarantee as defined in *Wade* and other cases.

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* Compare *Kirby* v. *Illinois*, No. 70-5061, decided June 7, 1972, holding that the Sixth Amendment guarantee, as it language suggests, is applicable only after the commencement of a "criminal prosecution" by "the initiation of adversary judicial criminal proceedings" (Slip Op. p. 7).

A. *The holding in* United States v. Wade, *388 U.S. 218, that the Sixth Amendment right to counsel applies to a police lineup, should not be extended to cover a pre-trial display of photographs to a witness.*

The holding in *Wade* requiring the presence of counsel at lineups came after careful scrutiny of that pre-trial confrontation "to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself" (388 U.S. at 227). Lineups were found to be peculiarly susceptible to many suggestive influences which, due to the nature of the confrontation and the conditions present, could seldom be reconstructed at trial. As the Court observed (388 U.S. at 230-231):

> Those participating in a lineup with the accused may often be police officers; in any event, the participants' names are rarely recorded or divulged at trial. The impediments to an objective observation are increased when the victim is the witness. * * * In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers.

The inability of the accused to "reconstruct at trial any unfairness that occurred at the lineup," the Court held, tended to deprive the defendant of his only real opportunity to attack the credibility of the witness' courtroom identification (388 U.S. at 232). The presence of counsel, principally as an observer, or the adoption of regulations which "eliminate the risks of abuse and unintentional suggestion at lineup[s] * * * and impediments to meaningful confrontation at trial" (388 U.S. at 239), was held to be essential to protect an accused from the "many variables and pitfalls" against which he was required to stand "unprotected" (388 U.S. at 235).*

The holding in *Wade* thus rests on two principal grounds: the lineup involves a stage of the prosecution in which the accused is a participant and in

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*The Court in *Wade* also suggested that the "presence of counsel itself can often avert prejudice" to the defendant and prevent "the infiltration of taint in the prosecution's identification evidence" (388 U.S. at 236, 238). But the holding in the case did not turn on this somewhat speculative collateral "benefit." Compare *Gilbert* v. *California*, 388 U.S. 263, holding that counsel was not required when handwriting exemplars were taken from the accused. While it was there acknowledged that "an unrepresentative exemplar" might be taken, this fact could be "brought out and corrected through the adversary process at trial" (388 U.S. at 267). See also, *United States* v. *Wade*, *supra*, 388 U.S. at 227-228, holding that counsel was not required at such preparatory steps "as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair and the like" because "[k]nowledge of the techniques of science and technology is sufficiently available * * * that the accused has the opportunity for a meaningful confrontation * * * at trial through the ordinary processes of cross-examination * * * and the presentation of the evidence of his own experts."

which the presence of counsel is necessary to preserve his right to a fair trial. A photographic identification, unlike a lineup, does not involve either of these factors.

B. *Unlike a police lineup, a photographic display does not involve the possibility of suggestive influences whose presence cannot be fully discovered at the trial.*

There are substantial differences between a forced confrontation at a lineup and a display of photographs to a witness. As Judge Wilkey observed in his dissenting opinion below, a lineup is a "little drama" stretching over an appreciable span of time. "The accused is there in the flesh, three-dimensional and always full-length" (Pet. App. A, 29a). Moreover, the accused is not merely present but may be required to move about, perform certain acts, don particular clothing, or speak the identical words used during the commission of the offense. While this transpires the witness, often nervous and afraid of being spotted by the perpetrator of the crime, observes the subject at close range sometimes performing the very acts the criminal did during the perpetration of the crime. See *People* v. *Lawrence*, 4 Cal. 3rd 273, 278, 481 P. 2d 212, 215 (Sup. Ct., *en banc*), certiorari denied, No. 70-352 (June 12, 1972). The potential for improper suggestion is present in the lighting used, the demeanor, appearance, and physical characteristics of the other participants as compared to those of the accused, the clothing worn by the accused as well as the words he may be required to

speak. Wall, *Eye-witness Identification in Criminal Cases*, pp. 55-63. The inability of "unschooled" witnesses and "uncounselled" defendants at these emotionally unsettling confrontations to reconstruct "suggestive influences" is apparent. *United States* v. *Wade*, *supra*, 388 U.S. at 230.

By contrast a photographic display involves none of these subtle and undetectable influences. As the Supreme Court of California observed:

> At photographic identification proceedings, however, the accused is not present and the witness observes only static poses of those pictured. When mug shots are used the witness is presented with only a collection of faces. Such a witness does not observe the suspect repeat actions or hear the accused speak. [*People* v. *Lawrence*, *supra*, 4 Cal. 3rd at 278, 481 P. 2d at 215.]

Despite these differences, photographic displays may be subject to suggestive influences (*Simmons* v. *United States*, 390 U.S. 377, 383). But while the opinion in *Wade* spoke of the danger of suggestion at lineups being present "in many subtle ways," which may not be capable of reconstruction at trial (388 U.S. at 229, 236), only "[t]hree types of suggestion" have been mentioned as possible during photographic displays:[10] (1) the type of photographs used, *i.e.*, if the photo of the defendant is markedly different from the others;[11] (2) the manner in which

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[10] Note, *Criminal Procedure-Photo-Identifications*, 43 N.Y.U. L. Rev. 1019, 1021-1022 (1968).

[11] Wall, *Eye-witness Identification in Criminal Cases*, pp. 81-82.

the photographs are spread out or handed to the witness; and (3) suggestive comments or gestures, by law enforcement authorities, *i.e.*, pointing out a suspect's picture or asking whether a suspect's picture is that of the perpetrator.[12]

These "three types of suggestion" are not very subtle as compared to those potentially present at lineups. Moreover, the availability of the photographs displayed permits a complete "reconstruction" of exactly what occurred at the display including any "suggestion" resulting from the character of the photographs themselves or the way they were shown to the witness. Additionally, the circumstances under which photographs are displayed—frequently at the home or place of business of the witness—enhance the likelihood that the witness will readily recollect at trial any impropriety involved in the display. All the witness need do is to "focus at that time on one thing only, the photographs, and be able to recall only one additional thing, any hint of suggestion in the way the photos were displayed or in the conversation of the official conducting the interview" (dissenting opinion of Judge Wilkey, Pet. App. A, 30a).[13]

The reported cases reflect the ease with which witnesses have been able to reconstruct any sugges-

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[12] Williams & Hammelman, *Identification Parades-I*, 1963 Crim. L. Rev. (Eng.) 479, 484; Comment, 2 U.C.L.A. L. Rev. 552, 554.

[13] In this case the photographic identifications were made in the witnesses' places of business or homes (Pet. App. A, 30-a).

tivity present as a result of the type of photographs used,[14] the manner in which the photographs were displayed, and comments made by law enforcement officials during the course of the interview with the witness.[15] Indeed, the majority opinion in the court below, which develops at length the alleged impropriety present in photographic displays, provides a clear example of the reconstructability of those displays. On the basis of the evidence adduced at the suppression hearing, the court of appeals was able to give the following description (Pet. App. A, 9a):

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[14] See, *e.g.*, *United States* v. *Fernandez*, 456 F. 2d 638, 641 (C.A. 2), holding improper an array in which only one of six photographs bore a resemblance to the description of a suspected bankrobber; *United States* v. *Zeiler*, 427 F. 2d 1305, 1308 (C.A. 3), holding improper an array of photographs, three of which were of the defendant in ordinary poses wearing glasses—which fit the description of the suspect—while the other five were mug shots of subjects pictured without glasses; *People* v. *Slutts*, 259 Cal. App. 2d 886, 66 Cal. Rptr. 862, holding improper an array which included a photograph of the defendant on which the police officer, prior to displaying the photographs, drew in a beard to conform to the witness' description of the criminal as wearing a beard.

[15] See, *e.g.*, *United States* v. *Trivette*, 284 F. Supp. 720 (D. D.C.) holding improper a police official's question whether a particular photograph was that of the man who committed the crime, but approving the manner in which the photographs were displayed; compare, *Saville* v. *United States*, 400 F. 2d 397 (C.A. 1), where the police officer was merely quoted as asking the witness to look at the photographs and identify the perpetrator of the crime. See also, *State* v. *Fullen*, 404 P. 2d 732 (Ariz.); *Hernandez* v. *State*, 255 A. 2d 449 (Md.); *State* v. *Moore*, 435 S.W. 2d 8 (Mo.), each of which discusses the propriety of various comments by police officers at suppression hearings, which were described by the witnesses.

> As to the May 1968 identifications, from color photographs shown on the eve of trial, the pictures are present in the record before us. It will be recalled that the only description at the time of arrest was in terms of being tall and of thin build. The color photographs in the record show that both Ash and Bailey are tall and slender, while the other three men whose photographs were used appear to be of stocky build. Despite the witnesses' reliance at the time of the crime on description in terms of bodily characteristics, only Ash and Bailey are pictured full-length; the other three subjects are cut off at mid-thigh, waist, and mid-chest, respectively. Finally, the photographs of Ash and Bailey, shown standing next to height poles, bear police identification numbers, while there are no such numbers on the other three photographs.[16]

It is thus readily apparent that one of the crucial circumstances which rendered the lineup a critical stage of the proceeding—the inability of the defend-

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[16] The issue whether the photographs were impermissibly suggestive, as earlier noted (*supra*, p. 6) was not resolved by either court below. The district court did not reach the issue because of its holding that the prosecution had established by "clear and convincing evidence" that the in-court identifications were based on observations of the suspect other than the photographic display (App. 63-64). The court of appeals did not reach the issue because of its Sixth Amendment holding, but indicated that it would have remanded for "a more thorough hearing and more definite findings" on what it characterized as the "substantial claim of impermissible suggestiveness" (Pet. App. A, 11a). If the Court agrees with our submission that the basis of the court of appeals decision was erroneous, then this issue would have to be resolved on remand.

ant "to reconstruct at trial any unfairness that occurred at the lineup"—is not present to any significant extent in photograph displays and the defendant is not entitled to the presence of counsel. As the Court of Appeals for the Third Circuit held in *United States ex rel. Reed* v. *Anderson*, No. 71-1816 (April 11, 1972) (S. App. 12a):

> If, as here, the identification is not in a live lineup at which defendant may be forced to act, speak or dress in a suggestive way, where the possibilities for suggestion are multiplied, where the ability to reconstruct the events is minimized, and where the effect of a positive identification is likely to be permanent, but at a viewing of immobile photographs easily reconstructible, far less subject to subtle suggestion, and far less indelible in its effect when the witness is later brought face to face with the accused, there is even less reason to denominate the procedure a critical stage at which counsel must be present.[17]

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[17] The earlier opinion of the Court of Appeals for the Third Circuit, relied upon by the majority below, *United States* v. *Zeiler*, 427 F. 2d 1305, was overruled in *United States ex rel. Reed* v. *Anderson*, *supra*, (S. App. 12a). Judge Gibbons, who concurred in the holding in *Reed* that the Sixth Amendment does not require the presence of counsel at photographic displays, suggested that such a requirement be imposed in the exercise of the court's supervisory powers (S. App. 27a). That proposal seems inconsistent with 18 U.S.C. 3502, which governs the admissibility of in-court identifications and which was enacted following the decision in *Wade*. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 53. The expression of Congressional intent should not only be considered before *Wade* is extended to a photographic identification but would also seem to pre-

Accord: *United States* v. *Bennett*, 409 F. 2d 888 (C.A. 2), certiorari denied *sub nom. Haywood* v. *United States*, 396 U.S. 852; *United States* v. *Ballard*, 423 F. 2d 127 (C.A. 5); *United States* v. *Serio*, 440 F. 2d 827 (C.A. 6); *United States* v. *Gornick*, 448 F. 2d 566 (C.A. 7), certiorari denied, 404 U.S. 861; *United States* v. *Long*, 449 F. 2d 288 (C.A. 8), certiorari denied, 405 U.S. 974; *United States* v. *Smith*, 423 F. 2d 1290 (C.A. 9), certiorari denied, 398 U.S. 930; *Rech* v. *United States*, 410 F. 2d 1131 (C.A. 10), certiorari denied, 396 U.S. 970; *People* v. *Lawrence*, *supra*, 4 Cal. 3rd 273; *Brokenbrough* v. *State*, 287 A. 2d 657 (Del.); *Staten* v. *State*, 248 So. 2d 697 (Fla. App.); *People* v. *Martin*, 265 N.E. 2d 685 (Ill.), certiorari denied, 403 U.S. 921; *Williams* v. *State*, 275 A. 2d 522 (Md.); *Commonwealth* v. *Gerasway*, 245 N.E. 2d 423 (Mass.), certiorari denied, 396 U.S. 911; *Stevenson* v. *State*, 244 So. 2d 30 (Miss.); *State* v. *Moss*, 191 N.W. 2d 543 (Neb.);

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clude the adoption of a rule in the exercise of the Court's supervisory powers which would make the admissibility of in-court identifications dependent upon the procedures employed at photographic displays. See *McNabb* v. *United States*, 318 U.S. 332, 341, n. 6. Compare *Simmons* v. *United States*, *supra*, 390 U.S. at 384. While here the basis of reversal was that evidence of a prior photographic identification was admitted, the effect of the holding requiring the presence of counsel at photographic displays goes much further than precluding evidence of identifications made at such displays. An in-court identification following a "defective" photographic identification would be admissible only upon a showing "by clear and convincing evidence" that the in-court identification of such witness was "based upon observations of the suspect" other than at photographic displays. See *United States* v. *Wade*, *supra*, 388 U.S. at 240.

People v. *Spinks*, 326 N.Y.S. 2d 261 (S. Ct. App. Div.); *State* v. *Stepney*, 185 S.E. 2d 844 (N.C.); *State* v. *Nettles*, 492 P. 2d 567 (Wash. App.); *Kain* v. *State*, 179 N.W. 2d 777 (Wisc.); contra: *Cox* v. *State*, 219 So. 2d 762 (Fla. App.); *People* v. *Adams*, 172 N.W. 2d 547 (Mich. App.); *Commonwealth* v. *Whiting*, 266 A. 2d 738 (Pa.), certiorari denied, 400 U.S. 919; *Thompson* v. *State*, 451 P. 2d 704 (Nev.).[18]

C. ***The presence of counsel at a photographic identification is not required in order to preserve the defendant's right to a fair trial.***

The second factor common to all cases which have extended the Sixth Amendment's guarantee to various

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[18] Compare *United States* v. *Brown*, C.A.D.C., No. 24,452, opinion filed March 1, 1972 (Pet. App. B), in which the court below, *en banc*, held that counsel for the defendant was not required to be present at an interview conducted by the prosecutor with a witness who was shown a photograph taken of a lineup at which she was not able to make an identification. Counsel for the defendant was present at the lineup. The court held that counsel was not required at the interview because (1) the photograph was merely a "completely neutral and wholly exact reproduction [of the lineup at which counsel was present]" and (2) the possibility of suggestion in displaying the photograph was minimized by the "professional responsibilities * * * of the prosecuting attorney, and the defense counsel's right of cross-examination" (Pet. App. 98a). See, also, *United States* v. *Collins*, 416 F. 2d 696 (C.A. 4) holding that counsel is not required, at a display of the photograph of a lineup to witnesses who were unable to attend the lineup at which defendant was represented by counsel; *United States* v. *Evans*, 459 F. 2d 481 (C.A. 4), pending on petition for a writ of certiorari, No. 71-6746, holding that an accused in custody is not entitled to counsel at a photographic display to a witness to a crime unrelated to that for which he was incarcerated.

pre-trial steps—the need for the presence of counsel to insure the defendant a fair trial—is also lacking here. The photographic display essentially involves only an interview between a law enforcement officer and a witness; the interview does not involve "a confrontation compelled by the State between the accused and the victim or witnesses" (*United States* v. *Wade*, *supra*, 388 U.S. at 228). The accused is not present and does not have any legal right to be present, at such interviews.

The early cases extending the Sixth Amendment's guarantee were based upon "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with the power to take his life or liberty * * *." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463; see also *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345; *Powell* v. *Alabama*, 287 U.S. 45, 68-69. While subsequent cases have recognized the necessity of counsel at both formal and informal proceedings other than the trial itself, those decisions have stressed the necessity for counsel "to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered." *United States* v. *Bennett*, *supra*, 409 F.2d at 900. None of those decisions involved proceedings at which the defendant himself was not a participant. See, *e.g.*, *Coleman* v. *Alabama*, 399 U.S. 1, 9, extending the right to counsel to preliminary hearings where "the guiding hand of counsel * * * is essential to protect the indigent accused against an erroneous or improp-

er prosecution"; *Hamilton* v. *Alabama*, 368 U.S. 52, and *White* v. *Maryland*, 373 U.S. 59 extending the right to counsel to arraignments where "[a]vailable defenses may be * * * irretrievably lost if not then and there asserted" (368 U.S. at 54) and where counsel is essential to enable the accussed "to plead intelligently" (373 U.S. at 60); *Massiah* v. *United States*, 377 U.S. 201, extending the right to counsel to post-indictment interrogation of the accused; see also, *Mempa* v. *Rhay*, 389 U.S. 128; *In re Gault*, 387 U.S. 1.

These decisions, as the Court held in *Wade*, reflect the principle "that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal, informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" (388 U.S. at 226).[19] But unlike

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[19] The Court in *Wade* made repeated reference to "confrontation" between the accused and the witnesses at a lineup. After discussing "critical confrontations of the accused," 388 U.S. at 224, and "pre-trial confrontation" and "meaningful confrontation," 388 U.S. 227, the Court focused on the "confrontation compelled by the State between the accused and the victim or witnesses," 388 U.S. at 228, and stated, "The pretrial confrontation for purpose of identification may take the form of a lineup * * * or presentation of the suspect alone to the witness * * *," (388 U.S. at 229). By contrast the Court recognized that display of photographs to witnesses was commonplace and held that one of the ways the prosecution could overcome the taint of an improperly conducted lineup was to show an "identification by picture of the defendant prior to the lineup," 388 U.S. at 241. There was no suggestion that counsel was required when such an identification was made. See, also, *Simmons* v. *United States*, 390 U.S. 377, 384.

Wade and the other cases, the accused here was not required to "stand alone" at the interviews that took place between the witnesses and the prosecutor. And, as Chief Judge Friendly observed in *United States* v. *Bennett*, *supra*, 409 F.2d at 899:

> [T]o require that defense counsel be allowed or appointed to attend [such] out-of-court proceedings where the defendant himself is not present would press the Sixth Amendment beyond any previous boundary. * * *

See also, *United States ex rel. Reed* v. *Anderson*, *supra* (S. App.); *United States* v. *Serio*, 440 F.2d 827 (C.A. 6); *People* v. *Lawrence*, *supra*, 4 Cal. App. 3rd 273, 481 P. 2d 212.

There are no persuasive reasons for such an extraordinary extension of the Sixth Amendment. As we have already shown, the potential for impropriety that is alleged to be present in photographic displays is readily capable of reconstruction at trial; and where such impropriety is shown to have taken place, a remedy is available (see *supra* pp. 14-19). Moreover, "[m]any other aspects of the prosecution's interviews with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews, notably with alibi witnesses" (*United States* v. *Bennett*, *supra*, 409 F.2d at 900). Yet it has never been held that counsel for a defendant has a right to be present at such interviews or that the preparation of a witness for trial is a "critical stage" of the proceeding.

On the contrary, under our adversary system "the State is entitled to investigate and develop its case outside the presence of defense counsel. This includes the right to have private conversations with identification witnesses, just as defense counsel may have his own consultations with these and other witnesses without having the prosecutor present" (*United States* v. *Wade*, *supra*, 388 U.S. 259, dissenting opinion of Mr. Justice White). Such interviews as well as other stages in trial preparation should not and need not be encumbered or hindered by the presence of a defense lawyer.[20]

The court below, however, suggested that a "crucial distinction" should be drawn between photographic identifications and ordinary interviews with witnesses because "[t]he prosecutor cannot introduce testimony on direct of the statements given by a witness in an earlier interview * * * [while] he may introduce the

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[20] The reluctance of many citizens to become involved in criminal trials as witnesses is a problem which law enforcement authorities constantly face. The problem will only be further compounded if pretrial proceedings, such as interviews with the prosecutor, are transformed into quasi-adversary proceedings with defense counsel "hover[ing] over witnesses and beginn[ing] their cross-examination." (*United States* v. *Wade*, 388 U.S. 259, dissenting opinion of Mr. Justice White). Moreover, some witnesses may refuse to participate because of fear for their own safety if their identity is disclosed at an early date. This is particularly so where crimes of violence are concerned. The very actions necessary to conceal identity at lineups which were suggested in *Wade* (388 U.S. at 238, n. 28)—such as masking the witness—can only add to the disruptive effect on ordinary interviews and perhaps compound the witness' fears.

witness's prior identification" (Pet. App. A, 16a-17a). But prior consistent statements are generally admissible when offered "to rebut an express or implied charge against him of recent fabrication or improper influence or motive." *Revised Proposed Rules of Evidence for United States Courts and Magistrates*, 51 F.R.D. 315, Rule 801(d); IV Wigmore, *Evidence* §§ 1129-1130 (3d ed.) and cases cited. Charges of recent fabrication and the like are frequently leveled at such key prosecution witnesses as accomplices or informers.

Moreover, far more protection against impropriety is afforded in cases involving photographs because of the ease with which impropriety may be rooted out and because of the procedures followed prior to the admission of evidence of a pre-trial identification. Before such evidence is admitted the defendant may cross-examine the identification witnesses. "Armed with this information, defense counsel at trial knows precisely where to attack the prosecution's evidence, where to press the cross-examination, where to tread lightly or not at all. In regard to no other phase of the prosecution's case does the defense have these opportunities and advantages." (Dissenting opinion of Judge Wilkey, Pet. App. A, 32a-33a).

The evidence of the prior photographic identification in the instant case was admitted after a pre-trial hearing fully disclosed whatever improprieties were present as well as the potential points of defense attack. The pre-trial interview at which the photographs were displayed was shown to have been part

of the preparation of the witnesses for a trial that was to take place two years after the crime was committed. The display of photographs, as Judge Wilkey observed, "was part of counsel's testing their recollection of pertinent facts of the case before putting them on the stand for questioning" (Pet. App. A, 33a).

A prosecutor attempting improperly to influence the in-court identification could easily have given a verbal picture of the defendants and indicated to the witness, if they were not already aware of the fact, that both defendants would be seated at the defense table. The prosecutor here instead took the risk that the witnesses would not be able to make an identification when the photographs were displayed and that the defendants would then be able to use this information in attacking any in-court identification that might be made. The presence of counsel at the display would not have resulted in a more meaningful reconstruction of the alleged impropriety than was accomplished by the production of the photographs; nor would a rule requiring the presence of counsel have prevented a prosecutor intent on improperly influencing the in-court identification from finding a way to do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded to that court for consideration of the other issues it left undecided.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

EDWARD R. KORMAN,
Assistant to the Solicitor General.

JEROME M. FEIT,
PETER M. SHANNON, JR.,
Attorneys.

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1255

UNITED STATES OF AMERICA,

Petitioner,

v.

CHARLES J. ASH, JR.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

SHERMAN L. COHN
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Attorney for Respondent

Washington, D.C. • THIEL PRESS • (202) 393-0625

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The majority and dissenting opinions of the court of appeals are reported at 461 F.2d 92.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1972 (Pet. App. C).[1] The petition for a writ of certiorari was filed on March 31, 1972, and was granted on June 12, 1972 (App. 133). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment, the out-of-court identification of respondent was so impermissibly suggestive and unreliable as to constitute a violation of due process.

2. Whether, under the Sixth Amendment, a defendant in a criminal case is entitled to the presence of counsel at any type of pretrial identification, photographic as well as corporeal.

STATEMENT

Respondent, Charles J. Ash, Jr., and one John L. Bailey were indicted on April 1, 1966, in the United States District Court for the District of Columbia for bank robbery under 18 U.S.C. 2113(a) and 22 D.C. Code 2901 (App. 1). The trial began on May 8, 1968, two years and nine months after the robbery (App. 7). Mr. Ash was convicted on all counts, and on June 21, 1968, was sentenced to a term of 80 months to 20 years (App. 8).[2] Mr. Bailey was acquitted on all counts.

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[1] "App." refers to the printed appendix in this Court. "Pet. App." refers to the appendix of the Government's petition for a writ of certiorari.

[2] He was sentenced to 80 months to 20 years on Counts 1 and 4 of the indictment and 5 to 15 years on Counts 2, 3 and 5, the sentences to run concurrently but consecutively with any other previously imposed sentence (App. 8).

On August 21, 1968, Mr. Ash was granted leave to appeal *in forma pauperis* to the United States Court of Appeals for the District of Columbia Circuit (App. 8). The conviction was reversed on March 1, 1972, by that court, sitting *en banc* and remanded to the District Court for new trial (Pet. App. 1a-85a). The Government petitioned for a writ of certiorari on March 31, 1972. Mr. Ash *pro se* filed a brief statement in opposition and seeking appointment of counsel. The petition was granted on June 12, 1972. Present counsel was appointed by this Court on June 27, 1972.

1. There is no dispute as to the facts of the bank robbery: a young Negro male came into the bank at about 10:15 a.m. on August 26, 1965, placed a woman's stocking as a mask over most of his face, waved a gun and ordered everyone not to move. Several seconds later another figure, also wearing a stocking mask, came running through the lobby and then behind the tellers' cages, seized some money, and ran out. The gunman followed. The entire occurrence lasted three or four minutes (App. 78-79, 85-86, 89, 91-92, 97-98). The dispute is as to whether the respondent, Charles J. Ash, Jr., was the gunman in the robbery.

The evidence upon which Mr. Ash was convicted consisted solely of the testimony by an informer, Clarence McFarland,[3] and the identification of Mr. Ash

[3]Mr. McFarland at that time was serving a sentence for bank robbery, and was awaiting grand jury action on five offenses, including one to which he had confessed. An Assistant United States Attorney had agreed to testify before the parole board on Mr. McFarland's behalf, had arranged to have Mr. McFarland transferred from the District of Columbia Jail to one in Rockville, Maryland, and had helped Mrs. McFarland move to an apartment closer to the school that the McFarland children were to attend (Pet. App. 8a). Mr. McFarland testified generally that Mr. Ash had

by four witnesses to the robbery. The issues before this Court concern the trial court's action in admitting over objection evidence of an out-of-court identification of Mr. Ash by the witnesses to the robbery. This identification occurred after the indictment, while Mr. Ash had counsel, on the day before and the morning of the first day of trial.

2. Counsel objected to the use as evidence of the pre trial photographic identification on the ground that it was made in violation of Mr. Ash's Fifth Amendment and Sixth Amendment rights as set forth in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Wade v. United States*, 388 U.S. 218 (1967). Moreover, objection was made to any in-court identification on the ground that it lacked a basis independent of the constitutionally excluded evidence (App. 10, 36-41, 127-28, 130). The trial held a "Stovall" hearing out of the presence of the jury. The disputed evidence was admitted (App. 63-64, 130-31).[4]

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asked him to help rob the bank and that after the robbery had told him that he and Mr. Bailey had perpetrated the robbery (Pet. App. 7a-8a).

[4] Judge Wilkey, dissenting in the court below, stated that "there was *never* an objection, explicit or implicit, by Ash's counsel to the admission of all five photographs" (Pet. App. 65a). The majority, of course, found otherwise (Pet. App. 6a-7a). While Judge Wilkey is correct that the discussion is jumbled (App. 127-31), one thing stands out: Mr. Ash's trial counsel time and again objected to the admission of Mr. Ash's picture either in conjunction solely with the picture of Mr. Bailey or with all of the other four. For example, when the prosecuting attorney first suggested that Mr. Ash's photograph should go into evidence, his trial counsel stated "I will object to that" (App. 127). Then when the prosecutor went on: "as a matter of fact, I think they should all go into evidence." Mr. Bailey's attorney replied: "I have no objection to that at all. Mr. Rosen, [Mr. Ash's trial counsel] of course, does." (App. 128). Again, when the prosecutor stated: "I think they all should come

3. There were four witnesses who testified concerning the persons involved in the robbery. Two, Mrs. Paugh and Mrs. Major, were bank tellers (App. 78, 84-85). One, Mr. Taylor, was a customer in the bank (App. 91, 94-95). The fourth, Mrs. Apple, was sitting in an automobile around the corner from the bank entrance and observed briefly two men running past her automobile (App. 97-98).

Mrs. Paugh testified at trial that the time-span of the robbery, which took place almost three years earlier, was approximately three minutes. During this time she looked constantly at the gunman who wore a woman's stocking as a mask over most of his face (App. 81). She could make out no features on his face, being able to determine only that he was tall and thin (App. 82). This comported with the description she gave to the police of "a young man about 19 years of age who was about 6 feet tall, Negro, male, light-skinned" (App. 60).

Mrs. Major testified that she looked at the gunman most of the time during the robbery (App. 86), but that, because of the stocking over most of the face, she could not make out his face (App. 89). Thus, she could note that the gunman was a "light-skinned Negro," "about six feet," and "slender" (App. 89).

Mr. Taylor, the bank customer, stated that, as he transacted his business with a bankteller, the bank door opened. Mr. Taylor "glanced instinctively" at the door and saw a man come in and then resumed his conversation. Mr. Taylor thus glanced at the gunman for a "few seconds" prior to his putting on his mask. In this

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in," Mr. Rosen replied: "I would object to Mr. Ash's picture." (App. 128). And, of course, Mr. Rosen earlier in the trial had argued against the admission of any of the out-of-court identification evidence. (App. 36-41).

period, Mr. Taylor did not fully make out the man's features, but believed that he had a mustache and did not wear glasses (App. 91-92, 95). Mrs. Apple was seated in a car around the corner from the door to the bank, waiting for her husband (App. 98). Her car had tinted glass which she agreed reflects the sun and distorts the vision (App. 111). She had a "fleeting glimpse" of a man running around the corner with a bag (App. 109). She then saw a second man running around the corner—"less than five minutes" later (App. 109). She saw the full face of neither man (App. 109). In her "fleeting glimpse" she saw only a profile, noting no distinguishing marks, scars, mustaches, or glasses (App. 110). She described them as being of about the same height (around 5 feet 8 inches) and weight (170 to 180 pounds) and "not too dark complected" (App. 67, 111).

Based upon descriptions given them by these witnesses, the police dispatched a lookout that described the gunman only in terms of height, weight, and general appearance, rather than of facial description. It called for a "Negro male, 19, six foot, 165, thin build" (App. 15, 22).

At least five months after the robbery, in January and February 1966, an FBI agent and a District of Columbia policeman showed to the four witnesses five black and white photographs of Negro males, including ones of Mr. Ash and Mr. Bailey (App. 11-12). These photographs were solely "mug shots of the face[s]" of the Negro males, thus giving no indication of the height of the subjects (App. 12, 14). The witnesses selected Mr. Ash's photograph as a likely suspect. Mrs. Apple stated that "she wasn't sure" Mr. Ash's photo "looked like" the man in the bank. Mr. Taylor said he believed it was he, but he said that he could be more sure "if he could see him in person" (App. 11-13).

The 1966 photo identification was never related to the jury,[5] either in oral description or through the photographs themselves. The jury, however, was told of the subsequent, 1968, photo identification (App. 130).

This 1968 photo identification occurred on May 7 and 8, the day before trial and the first day of trial. At that time the four witnesses were asked to look at five photographs for the purpose of possible identification. This time the photographs were in color. The photographs were shown to the witnesses by the prosecutor and an F.B.I. agent. As before, Mr. Ash's counsel was not present. Of these five pictures only those of Mr. Ash and Mr. Bailey were full length. The other three were only half-body length, that is, from the waist up. Only the pictures of Mr. Ash and Mr. Bailey contained a "height marker or some sort of pole" next to the subject. The others did not. Only the pictures of Mr. Ash and Mr. Bailey contained police identification numbers; the others did not (App. 29-33). Again, only uncertain identifications were made of Mr. Ash; no identification was made of Mr. Bailey (App. 33). Mrs. Paugh and Mrs. Major, who had seen the gunman only with his stocking mask and Mrs. Apple who had received a "fleeting glimpse" of him without the mask, chose Mr. Ash's picture as that of the person each thought or believed to have been the gunman, but without any certainty (App. 33-34). Mr. Taylor, who had seen the gunman without the mask, stated, "I am sorry, I am not certain" (App. 31).

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[5]The jury was advised that a photograph of Mr. Bailey was shown to Mrs. Apple, but was not advised whether she had been shown a photograph of Mr. Ash at that time (App. 120-24).

At trial, Mrs. Paugh, upon being asked four times by the prosecutor to make a definite identification of Mr. Ash, at first stated that she could not "be sure" if the gunman were in the courtroom, then that she could "not definitely" identify him in the courtroom, and finally that Mr. Ash "looks similar" to the gunman (App. 79-80).

Mrs. Major testified that, while she "believe[d]" that Mr. Ash was the gunman, she could not say so "with absolute certainty" (App. 87, 89-90).

Mr. Taylor testified at trial that Mr. Ash "looks like" the gunman but he could not "be certain" (App. 96).

Mrs. Apple was the only one of the witnesses who made a certain identification of Mr. Ash as one of the men who had run around the corner of the bank and of whom she had obtained a "fleeting glimpse" (App. 98-99, 110).

Mr. Ash has been incarcerated since November 9, 1965. Except for two periods of confinement in St. Elizabeth's Hospital for mental examination, he was constantly at the District of Columbia Jail from November 9, 1965, until after the trial terminated and he was sentenced in June 1968.[6] Yet, at no time was Mr. Ash placed in a lineup for in-person identification by the four witnesses to the bank robbery.

5. Upon appeal, respondent Ash raised again the denial of his Fifth and Sixth Amendment rights by the admission of evidence concerning the out-of-court photographic identification. He also urged that the in-court identification should have been excluded as being tainted

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[6]Counsel has received this information from the records of the District of Columbia Jail as read to him by Officer Luther McKenney of the Records Office of that Jail.

by the photographic identification. Finally, respondent urged that his Sixth Amendment rights to a speedy trial were denied.

The Court of Appeals, *en banc*, by a 5-4 vote, reversed, holding that the out-of-court photographic identification, occurring after indictment and without the presence of respondent's counsel, should have been excluded under this Court's rulings in *Wade v. United States*, 388 U.S. 218 (1967), and *Kirby v. Illinois*, 406 U.S. 682 (1972). The court therefore did not decide the Fifth Amendment issue based on *Stovall v. Denno*, 388 U.S. 293 (1967), and *Simmons v. United States*, 390 U.S. 377 (1968), concerning the admissibility of evidence of the photographic identification.[7] Having ordered a new trial, the Court of Appeals also found no reason to decide the propriety of the in-court identification, but referred that issue to the District Court for a determination in light of the evidence to be there submitted—although the court stated that upon the evidence then before the court "we doubt that we could sustain a finding of independent source" (Pet. App. 25a). Finally, the appellate court reserved the decision on the speedy trial issue to the trial court (Pet. App. 26a).

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[7]Although the court below did not rule upon the *Stovall-Simmons* issue, it concluded that "there are at the very least strong elements of suggestiveness in this color photo confrontation." (App. 9a.) The court also concluded that "Certainly the elements of suggestiveness were strong enough so that it cannot be assumed that there was no undue suggestiveness in the absence of explicit findings by the trial court." (App. 10a.) The appellate court directed the trial court, should there be a new trial upon remand, to make findings considering suggestiveness in ruling as to whether an independent source existed for the in-court identification (App. 25a-26a).

SUMMARY OF ARGUMENT

The respondent was brought to trial in 1968 on the charge of being a gunman in a 1965 bank robbery. The case against him consisted to a large extent of identification evidence. This evidence consisted of testimony that respondent had been identified in a May 1968 photo identification procedure and in-court identification of the respondent as the robbery gunman. Respondent urges that the court below correctly ruled that evidence of the 1968 photo identification could not be admitted into evidence at respondent's trial.

A. The 1968 identification procedure was so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to constitute a denial of due process in violation of the standards laid down by the Court in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Simmons v. United States*, 390 U.S. 377 (1968).

The likelihood of misidentification was ensured by these factors: At two separate stages respondent was identified by means of the less reliable and more suggestive photo identification procedure when at both stages he was available for a less hazardous corporeal identification. The opportunity of the witnesses to observe the robbers at the crime scene was scant, fleeting and blurred. The time-gap between the crime and the photo identifications was great. And the photo viewings, particularly the 1968 viewings, were blatantly suggestive: the respondent's photo was almost twice as large as any other in the array; only respondent and the other trial defendant conformed to the height and build description given by the police after the robbery in question; only the defendants were shown with height markers and police numbers; only the defendants' photos were

full-length. And the prosecuting attorney personally participated in and led this procedure, a year after *Stowall* and two months after *Simmons* were decided.

B. The 1968 identification procedure, coming a year after *United States v. Wade*, 388 U.S. 218 (1967), was post-indictment. And yet no counsel was present for the accused. *Wade*, both in its language and in its rationale, encompasses all identifications producing affirmative evidence of identification. This case clearly demonstrates that the evil to which *Wade* was addressed exists in photo identifications as well as in corporeal identifications, thus confirming the wisdom of *Wade's* broad reach. And the Government in its brief for this Court in *Wade* has agreed that there is no difference. Also, the facts of this case illustrate that photo identifications will be used to circumvent the right to counsel at lineups requirement of *Wade*, if *Wade* is now cut back so as not to apply to photo identifications. Finally, the parade of horribles presented by the Government to distinguish this case from *Wade* and from the Government's own argument in *Wade* are red herrings and have no application here.

ARGUMENT

I.

THE PHOTO IDENTIFICATIONS THE DAY BEFORE AND THE FIRST DAY OF TRIAL ARE SO UNNECESSARILY UNRELIABLE AND IMPERMISSIBLY SUGGESTIVE UNDER THE STANDARD OF *STOVALL* AND *SIMMONS* THAT THEY MUST BE EXCLUDED FROM ADMISSION INTO EVIDENCE IN ORDER TO AVOID THE LIKELIHOOD OF MISIDENTIFICATION.

1. *Introduction.* It is noted that the issue raised in this Argument is not explicitly included within the Government's petition for a writ of certiorari in this case. See Rule 40(d)(2) of this Court. While it may be argued that, since a determination of both this issue and the issue on which the Government petitioned depend upon an analysis of the same facts, one issue is fairly comprised within the other, see pp. 28-30, *infra*, respondent does not rest solely upon such a contention. Rather, the respondent rests as well upon the reasoning of *Pollard v. United States*, 352 U.S. 354, 358-59 (1957). In that case, an indigent party was *pro se* at the petitioning stage, and counsel was appointed after the grant of certiorari. 352 U.S. at 358. Appointed counsel presented at the briefing stage an issue that he would have raised at the certiorari stage. The Court concluded that it could consider the issue, although had counsel been present at the certiorari stage, it might well have refused to do so.

Here, respondent was without counsel when the petition for certiorari was filed; it was only after the grant of certiorari that present counsel was appointed by this Court. Should counsel have been representing respondent at the certiorari stage, he would have urged the present argument in opposition to the grant of

certiorari, or, in the alternative, as an additional issue to be considered upon the grant of certiorari. It is respectfully urged that precluding respondent from now presenting this issue would be a price for indigency that constitutes an impermissible denial to him of equal protection.[8]

2. The dangers involved in eyewitness identification are familiar to those involved in the law. As this Court noted in *Wade*, "the vagaries of eye-witness identification are well-known; the annals of criminal law are rife with instances of mistaken identification," 388 U.S. at 228, referring to and quoting from Mr. Justice Frankfurter's observations in *The Case of Sacco and Vanzetti* 30 (1927), and other authorities. The Court noted too that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial" *Ibid.*

This Court pointed out as well that "a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree

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[8] As Argument I constitutes merely an additional ground on which respondent urges an affirmance of the ruling of the court below that the out-of-court identification be excluded from evidence, counsel does not believe that additional relief is sought, necessitating a cross-petition for a writ of certiorari. See *Mulling v. General Industries*, 330 U.S. 545, 547 (1947); *Langnes v. Green*, 282 U.S. 531 533 (1931); *Public Serv. Comm'n v. Havemeyer*, 296 U.S. 506, 509 (1936). Should this Court disagree, however, counsel respectfully urges that this Brief be considered such a cross-petition as well. At least in criminal cases, the time limit on cross-petitions for certiorari is not jurisdictional. *Taglianetti v. United States*, 394 U.S. 316, n. 1 (1969); *Brotherhood of Ry. Clerks v. Florida E. Coast Ry.*, 382 U.S. 1008, 384 U.S. 238, 243 (1966); *Pierson v. Ray*, 384 U.S. 938 (1966), 386 U.S. 547, 551 (1967).

of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identification." *Id.* And, as the Court stated most recently in *Kirby v. Illinois*, because of these factors, "The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification." 406 U.S. 682, 691 (1972).

This is certainly not to say that eyewitness identification is never admissible. As the court below has made clear, "procedure for prompt identification of a suspect apprehended immediately after the offense is sound as a general procedure. . . ." *Wise v. United States*, 127 U.S. App. D.C. 279, 282, 383 F.2d 206, 209 (1967). And *Kirby v. Illinois*, 406 U.S. at 691, recently declared, the balance between these two interests—that of protecting the suspect "from prejudicial procedures" involved in eyewitness identifications and that which recognizes the "interest of society in the prompt and purposeful investigation of an unsolved crime"—has been struck by this Court in *Stovall v. Denno*, 388 U.S. 293 (1967). There, the Court set forth the standard that a trial court must suppress evidence of a confrontation which was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the suspect] was denied due process of law." And this determination depends upon "the totality of circumstances surrounding" the confrontation in the particular case. 388 U.S. at 302. The *Stovall* test does "not erect a due process barrier against all unreliable identification;" rather it requires exclusion of evidence which is "unnecessarily" unreliable, that is, as the court below has explained in another case, "evidence which could and should have been obtained by procedures less conducive to unreliability." *Russell v. United States*, 133 U.S. App.

D.C. 77, 82, 408 F.2d 1280, 1285, *cert. den.*, 395 U.S. 928 (1969).

This Court considered these principles in terms of pretrial photographic identification in *Simmons v. United States*, 390 U.S. 377 (1968). There the Court had before it a photographic identification on the day following the commission of the crime, 390 U.S. at 382. The Court, speaking through Mr. Justice Harlan, reiterated the *Stovall* standard, explicitly applying it to the photographic identification. The Court held that "eyewitness identification at trial following a pretrial identification by photograph"—and necessarily evidence of the pretrial identification by photograph itself—is inadmissible if it be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384. "[E]ach case," of course, "must be considered on its own facts . . ." *Ibid.* The Court went on to discuss those factual elements that should go into this consideration.

First, the Court looked at the necessity of photographic identification, noting that "corporeal identification . . . is normally more accurate."[9] 390 U.S.

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[9]Mr. Justice Harlan cited P. Wall, Eye-Witness Identification in Criminal Cases 83 (1965), where it is stated:

> Where there is more than one eye-witness who will be called upon to attempt an identification, two additional rules should be followed, each based upon a different consideration. The first rule, dictated by the principle that a properly obtained corporeal identification is more reliable than a properly obtained photographic identification, is that only one of the witnesses should be asked to view the photographs. If an identification is made, the person whose photograph is picked out may be arrested on the strength of the identification, and placed in a line-up for the benefit of the other witnesses, who have seen no photographs. This is the

at 384-85, 386 n. 6. In evaluating the necessity of photographic identification, the Court focused upon whether the perpetrators were still at large, the clues were otherwise inconclusive, and the need to determine "swiftly" how to deploy the investigative and arresting forces. 390 U.S. at 384-85.

Secondly, the Court looked at the photo identification procedure itself, to determine how much of a chance of misidentification existed. Focus was played upon the opportunity the witnesses had to observe at the crime itself, the time-span between the observation at the crime scene and the photo identification, the number of photographs shown to the witnesses, and any occurrence at the identification by which the photograph of the suspect is singled out from the others before the witness. 390 U.S. at 383, 385.

Finally, the Court looked at the results of the photo identification, focusing upon the positiveness of the witnesses' response both at the photo identification and later at trial. 390 U.S. at 385.

The Court pointed out the truism that "improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." 390 U.S. at 383. Photographic identification at best is only second

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usual procedure followed in England.[57] Similarly, all the witnesses may be shown photographs, with no two witnesses being allowed to see the same ones. When any one witness makes an identification, the viewing of photographs ceases, and the suspect is picked up and brought in for a properly conducted corporeal identification. In either case, of course, the witness who made the photographic identification will be asked to view the line-up.

[57] Williams, *supra* note 14, [Identification Parades [1955] Crim. L. Rev. 525] at 530-31. See also Mill, The Scottish Police 95 (1944), quoted in Rolph, Personal Identity 107-08 (1957).

best to "corporeal identification"—the lineup. But the dangers inherent in photographic identification are heightened where the witness did not have a good opportunity to view the suspect at the scene of the crime. And it will be increased where the police are not scrupulously careful at the identification to avoid suggestiveness. The danger, of course, lies not only in the misidentification itself, but in the fact that "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." 390 U.S. at 383-84. Yet, there is a certain necessity for photo identification, in "apprehending offenders and [in] sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." 390 U.S. at 384. The difficulty is to balance the necessity with the danger. That balance has been struck by the *Stovall* standard and by a careful weighing of the factual elements isolated in *Simmons*.

A comparison of the *Simmons* elements with those in the present case, it is submitted, demonstrate that the trial court erroneously admitted both the evidence of the photo identification and the in-court identification itself. Indeed, a comparison of the instant case with *Simmons* demonstrates that the only point of identity between them is that each involved a bank robbery.

A. No necessity for the use of photographs in the identification process existed in this case.

A crucial fact in this case is that, at the time that the investigation of the bank robbery focused upon Mr. Ash, he was in the custody of the police. The records of the District of Columbia Jail show that Mr. Ash was arrested

on November 9, 1965, and was constantly incarcerated by the District of Columbia police during the entire time from that date until trial in this case, and indeed is still incarcerated.[10] The first photo identification occurred in January and February 1966. The second photo identification occurred in May 1968. There was on either occasion no reason to settle for second best.[11] A corporeal identification in the form of a line-up was not only possible but was also convenient to the police.

These facts should be compared with those in *Simmons*. In *Simmons*, Mr. Justice Harlan pointed out that the perpetrators of the serious felony were "still at large." 390 U.S. at 384. Here, Mr. Ash was in custody of the police in the very city in which the identification procedure was to occur. In *Simmons* prompt action was necessary to confirm the then inconclusive clues so that police forces could be swiftly and properly deployed not only within the city but perhaps even in other cities to apprehend the suspect should the clues be confirmed. 390 U.S. at 385. Here, Mr. Ash was safely incarcerated mere city blocks away from both the courthouse and the scene of the crime. In *Simmons*, the police could have been concerned with confirming their clues promptly so as to avoid bestowing upon "innocent suspects the

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[10] See note 6, *supra* at p. 8.

[11] At most, it may be argued that a photo identification procedure was proper for one or two of the witnesses in 1966, that is, before the investigation already focused on Mr. Ash, if that be the case. This is to ignore, however, that Mr. Ash was then in the custody of the police and easily available for the corporeal identification. Even such an argument furnishes no justification for a photo identification procedure for the remaining witnesses in 1966 or of any of the witnesses in 1968. See Wall, quoted note 9, *supra*, pp. 15-16.

ignominy of arrest." 390 U.S. at 384. This factor was also emphasized in *Stovall*. 388 U.S. 293, 302. Here there was no danger of an innocent person being arrested. Mr. Ash was already incarcerated.[12]

Thus, here, unlike *Simmons*, there was no necessity for settling for second best. No purpose was served by by-passing a lineup and incurring the admittedly higher risk of misidentification that photo identification involves.[13]

B. The photo-identification procedure was such as to lead to a high probability of mis-identification.

When one examines this case in light of the factors that Mr. Justice Harlan considered important in weighing of a likelihood of misidentification, it is clear that the

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[12] Counsel has been advised that there is no record of Mr. Bailey being in custody at the time of the 1966 photo identification, but that he was in custody during the May 1968 photo identification. Counsel has been advised by Mrs. Payne of the Records Office of the Lorton Reformatory that the records of Lorton reflect that Mr. Bailey has been incarcerated continuously since March 7, 1968, on a conviction prior to the instant case. Although it is possible that Mr. Bailey may not have been available for a corporeal identification in January and February 1966, this would not have prevented a corporeal identification of Mr. Ash at that time; nor was there any necessity for a second-best identification procedure for either man in May 1968.

[13] A comparison with the facts in *Stovall* is also instructive. There, the witness was in a hospital bed awaiting major surgery to save her life. 388 U.S. at 295. She could not go to the jail for a lineup and no one knew how long she might live. 388 U.S. at 302. Thus, the Court concluded, an "immediate hospital confrontation was imperative" and could be countenanced. *Ibid.* Instructive as well is a comparison with the facts in *Kirby*.

identification of Mr. Ash as the bank-robbery gunman is highly suspect. In *Simmons* the Court focused upon four factors that are here crucial.

1. *Opportunity of witnesses to observe at the crime itself.* In *Simmons*, the robbery took place in broad daylight in a well-lighted bank. 390 U.S. at 385. This was so in the instant case as well. But in *Simmons*, the robbers wore no masks and the witnesses had ample opportunity to see "the robber later identified as Simmons for periods ranging up to five minutes." 390 U.S. at 385. Here, the situation was quite different. The two bank tellers, Mrs. Paugh and Mrs. Major, observed the gunman only while he was wearing a stocking mask that covered most of his face coming down over his nose (App. 81, 89). Mrs. Paugh testified that she could not identify any of the man's facial features; all she could tell was that the man was tall and thin (App. 82). Mrs. Major was also in the dark; she too could not make out the man's face; she too knew only that he was tall and slender, though she added that he was a Negro and light-skinned (App. 89). And Mrs. Major had been trained to notice "all the little details" in the event of a robbery and she had written them down immediately (App. 89).

The two other witnesses saw the gunman without his mask. But neither of their opportunities to observe rose to the caliber of that of *Simmons*. Mr. Taylor, a bank customer doing business with a third teller, just turned by "force of habit or instinct" and "glanced" at the door when it opened; he "had a glimpse" of a man and then resumed his conversation with the teller (App. 91, 93, 96). This instinctive glance lasted "just a matter of seconds" (App. 92). Thus, although the man did not then have a mask on, Mr. Taylor could "not fully" make out his features. He believed that the man wore a mustache

and no glasses, but that was all (App. 95-96). The fourth identification witness, Mrs. Apple, was sitting in an automobile that had tinted glass, which, she admitted, while reflecting the sun, distorts a person's appearance (App. 97, 111). As she sat there, Mrs. Apple saw a man run around the corner with a bag in his hand, followed by a second man also at a run (App. 98).[14] She received only a "fleeting glimpse" of the men, and at that only a profile of the right side of their faces; she could discern no distinguishing marks; she did not see whether either had a mustache or wore glasses, for she "didn't get that close a look" (App. 109-11). Indeed, she agreed, she "really couldn't see accurately the face that came towards" her, for she had only "a fleeting second" observation (App. 111-12).[15]

Thus, in sum, there was little opportunity for the crime witnesses to observe the man who held the gun in the robbery. The observations were distorted by a stocking mask or by tinted glass. They were fleeting glimpses and instinctive glances to the side. It is no wonder that none of the witnesses could describe a face

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[14] Mrs. Apple's estimate that five minutes passed between the two men running past her (App. 109) is contrary to the other witnesses' statements that the entire occurrence took from three to five minutes (App. 81, 86).

[15] Judge MacKinnon in dissent in the court below buttressed Mrs. Apple's opportunity to observe with the statement that she had seen "the same two men" ten minutes earlier sitting in a "cream colored Pontiac convertible that was parked in front of her husband's restaurant about a block away from the bank" (Pet. App. 80a). It is true that at first Mrs. Apple stated that "they" were parked in that car (App. 106). But upon being pressed later, she recanted and stated positively that she did not know who the two men in the Pontiac were (App. 114).

and that the police were given only a general picture of height and build and color. This is not *Simmons*. Nor, it is submitted, is it a reliable base on which to build a second-best identification.

2. *The time span between observation and identification.* In *Simmons* the time between the crime at which the witnesses had the opportunity to observe and the showing to them of photographs for the purpose of identification was but a day—as Mr. Justice Harlan said, "while their memories were still fresh." 390 U.S. 385. And in *Stovall* less than two days had passed. 388 U.S. at 295. Here, from the time of the crime in August 1965 until the first photo identification in January and February 1966, five and six months had passed. And from the time of the crime until the second photo identification in May 1968, two and three-quarter years had passed. By no stretch of the imagination could one say that these photo identifications were made "while their memories were still fresh." Indeed, after exhibiting much difficulty in describing the men she saw run past her in August 1965, Mrs. Apple at trial, on May 9, 1968, admitted that her memory had in fact dimmed since the time that she had made her observations (App. 110). And that admission was made just two days after she was asked to identify the fleeing men from the color photographs that were then introduced into evidence (App. 30, 130).

3. *The number of photographs used.* There were at least six photographs displayed to each witness in *Simmons*. Here there were photographs of five men used upon each occasion (App. 11-12, 29, 36). Although this Court indicated unhappiness with the fact that there were only six photographs used in *Simmons*, 390 U.S. at 386 n. 6, there is another factor in *Simmons* that, in contrast,

renders the situation in the instant case even more condemning. The inadequate number of six photographs "consisted primarily of group photographs," which by definition would contain more than one person each. 390 U.S. at 385. Here no group photographs were used. Thus, the procedure used here was not five-sixths as good as that thought to be inadequate in *Simmons*; it was many times worse!

4. *The photo identification itself.* Concerning this factor *Simmons* is left far behind in comparison. The witnesses here could identify no facial features, but only describe build and height and color. Yet, the photographs shown in 1966 were mug shots (App. 12, 14). But that did not approach the suggestiveness of the 1968 showing. Of the five men exhibited in the 1968 group of seven photographs, all were half-body length except those of Mr. Ash and Mr. Bailey, which were full length. And, perhaps to be sure that the point was not missed, Mr. Ash and Mr. Bailey were shown standing next to height markers. To further make the point, the three non-defendants in the photographs are not "thin" nor are they "slender" (the words used by the witnesses to describe the gunman, (App. 82, 89)), but their photographs show a stockiness that could not be described with those adjectives. Indeed, the contrast with the full length photos of Mr. Ash and Mr. Bailey only serves to accentuate the height and thinness of the two accused men. And only the pictures of Mr. Ash and Mr. Bailey contain police identification numbers (App. 33). The Court is respectfully invited to examine those five

photographs, which are included in the Court's file in this case.[16] See App. 33.

In *Simmons* this Court focused heavily on whether the police had done anything to suggest which persons in the pictures were under suspicion. 390 U.S. at 383, 385. It is respectfully submitted that in this case the prosecutor (it is he who handled the 1968 photo identification! (App. 29-30)) could have done no more than perhaps hang signs from each: "I did it!" Witnesses here could identify only height, build, and color. They were shown photographs of five men. Only two were full length. Only two were thin. Only two had height markers. Only two bore identification numbers. And those were the two who were about to go on trial. Moreover, Mr. Ash's photograph was 5" x 7", whereas the next largest was 4" x 5", What more could the prosecutor have done to refresh memories dimmed by so many, many months after such little opportunity to observe?

C. The doubts and lack of positiveness of identification.

The third factor that this Court considered in *Simmons* was the positiveness of the witnesses' response both at the photo identification and at trial. In *Simmons*, "notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective

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[16] For the convenience of the Court, counsel will try to reproduce those photographs as an appendix to this Brief, but at this writing has no knowledge as to how, if at all, they will come out. See p. 1a, *infra*. It should be noted that, although the testimony is clearly in terms of five photographs, there are three photographs of one of the men in the exhibit. Thus, apparently the witnesses were shown photographs of five men, and one of those men was in three pictures. But it is not clear whether all three of those pictures were shown to the witnesses.

identifications of Simmons." 390 U.S. at 385. The picture here is quite different.

Here only one of the four witnesses—the one who received the fleeting glimpse of a profile of running men seen through distorting tinted glass—was positive that Mr. Ash, sitting in the courtroom, was the same man who ran from the bank. Of the others, Mrs. Paugh, when asked by the prosecution to look around the courtroom to see if the gunman was there, replied: "I cannot be sure if he is here." Asked again if she could make an identification, she said, "Not definitely." (App.79.) And when pressed a third time, repeated that "I can make no definite identification," but went on to state: "Other than the fact there is a young man that is here that looks similar to the one in the lobby." (App. 80.) Mrs. Major, when asked whether the gunman at the bank was in the courtroom, replied: "I believe he is." (App. 87.)[17] Mr. Taylor, the fourth witness, could only say that Mr. Ash "looks sort of like the man" in the bank (App. 93). These, it is submitted, are a good deal less than positive identifications; three of the four witnesses were less than certain and displayed doubt—even after having their recollections refreshed a few days before.

And this doubt pervaded the photographic identifications as well. Although the witnesses chose Mr. Ash during the 1966 photo identification, they were not positive (App. 11-12). Indeed, Mr. Taylor, while selecting Mr. Ash's photograph "to the best of his belief," also expressed a desire to see Mr. Ash in person so as to be positive (App. 13). And Mrs. Apple "said she wasn't sure it [the photograph] looked like him [the gunman]"

[17] Mrs. Major later stated: "I have no doubt in my mind, but I cannot say with absolute certainty." (App. 90.)

(App. 13), but that it "could be" him (App. 25). The same was true in 1968. Then neither of the other two witnesses, Mrs. Paugh and Mrs. Major, were certain, but each stated that she thought that the photograph of Mr. Ash was that of the gunman (App. 34).

It is this uncertainty that also distinguishes the facts of this case from that of *Simmons*, and which leads further to a belief that both the photographic identification and the later in-court identification were the result of impermissible suggestiveness.

D. Thus the photographic identification here was impermissive, and this Court should so rule.

1. All out-of-court identifications carry some risk of unreliability and of suggestiveness. The most reliable and the least suggestive of such identifications is the properly conducted lineup. This much is clear. It is also clear that more dangerous forms of out-of-court identification are at times necessary for effective police enforcement. We are thus led to the balancing of the need for less than ideal out-of-court identification with the danger of the particular form employed. The standard of reconciling the competing interests is laid down by *Stovall*, and was most recently reiterated by Mr. Justice Stewart in *Kirby v. Illinois*, 406 U.S. 682, 691 (1972): "The Due Process Clause . . . forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification." This is *a fortiori* true of a photographic identification, which *Simmons* recognizes to be inherently more unreliable and less accurate than the lineup. And this standard is applied by *Simmons* to the photographic identification.

Here, it is submitted, the *Stovall-Simmons* standard requires that the evidence of identification be excluded. There was certainly no necessity for a second-best identification. Mr. Ash was easily found; indeed, he was within the very hands of the police. No manhunt awaited the outcome of a quick identification. No innocent man's arrest would hinge upon its outcome. No witness could not come to such a lineup. So there was no reason not to proceed with a lineup as the most reliable and most accurate method of out-of-court identification. And none has been proffered.

It has been suggested that under such circumstances even the most perfect photographic identification with its inherent dangers could be excluded. See *Russell v. United States*, 133 U.S. App. D.C. 77, 82, 408 F.2d 1280, 1285, cert. den., 395 U.S. 928 (1969), and *cf. Kirby v. Illinois*, 406 U.S. 682, 691 (1972). But this Court need not go so far in this case. Here there is much more. Here the witnesses had scant opportunity to observe the robbers. Here there was a gap in time between the robbery and the photo identification, first of five or six months, and then of almost three years. Here mug shots were shown to witnesses who had described the robbers only in terms of build, height, and color. Here photos were shown that truly pointed the finger at the accused men, that suggested in the most blatant manner whom to choose. The dangers of suggestiveness, which could have been virtually non-existent in this case, began to mount when the police, after focusing upon Mr. Ash as the accused, failed to hold a lineup, even when suggested by a witness. Those dangers climaxed in an overtly prejudicial photo identification the day before and the first day of trial. When one considers that all of these dangers of misidentification were unnecessary, the conclusion that

Mr. Ash was here denied due process is inescapable. The prosecution, having ample opportunity to minimize the likelihood of mistaken identification by furnishing the corporeal identification that at least one witness asked for (App. 13), maximized it instead. It is respectfully submitted that, if *Stovall* and *Simmons* and *Kirby* have any application, it is to this case.[18]

2. It is of course true that the court below did not decide the due process issue. Instead, should there be a new trial, the trial court is to make further findings concerning suggestiveness in connection with a ruling as to the existence of an independent source for a proper in-court identification. Should this Court reverse the holding of the court below that evidence of the out-of-court identification is inadmissible as a violation of *Wade*, its admissibility will still depend upon a determination of the due process issue. Whether or not this Court reverses the holding of the court below, the due process issue is a compelling ingredient of the admissibility of the in-court identification.

It is respectfully submitted that upon this record there is no need to remand to the District Court for findings concerning the existence of suggestivity, whether it was "conducive to irreparable mistaken identification," and whether it was "unnecessarily" so (*Kirby*, 406 U.S. at

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[18] Judge Wilkey, in dissent below, suggests that trial counsel may not have properly preserved his objection to the admission of this evidence (Pet. App. 63a-64a). The majority rejected this suggestion (Pet. App. 7a, n. 6). Respondent does not understand the Petition for Certiorari to have raised nor the Government's brief to have addressed itself to this issue. It should be noted, however, that the pretrial hearing was a *Stovall* hearing going to this very point (App. 10), and that these issues were argued at length (App. 36-41, 127-30).

691), for these elements of the *Stovall-Simmons* test are clearly present. The factual basis of this case is an essential underpinning in the determination of the *Wade* issue (on which the court below decided this case). Compare *Stovall* and *Kirby*. Indeed, as noted several times, Argument II, *infra*, it is just such a factual situation that has compelled this Court to fashion the "*pro se* exclusionary rule" of *Wade*, for it is only such a rule that "can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right[s] . . . ." *Gilbert v. California*, 388 U.S. 263, 273 (1967), recently reiterated in *Kirby*, 406 U.S. at 683. Having analyzed the factual basis of this case for the purpose of resolving the *Wade* issue, brought here by the Government, it is respectfully submitted that this Court should go as well to resolve the *Stovall-Simmons* issue, brought here by respondent. The record, it is submitted, is now complete for such a determination by this Court. See *Pollard v. United States*, 352 U.S. 354, 359 (1957).

Moreover, this Court will not reach a constitutional issue if there be any other ground on which to dispose of the case. See, *e.g.*, *Street v. New York*, 394 U.S. 576 (1969); *Boynton v. Virginia*, 364 U.S. 454 (1960). Respondent urges in Argument II, *infra*, that the court below decided no constitutional issue but rather merely decided the instant case in accordance with the law as established in *Wade*. However, should this Court disagree and consider the issue, as the Government presents it (Brief, p. 2) as a constitutional question to be decided, respondent urges that, since the case can be resolved solely on the application of *Stovall* and *Simmons* to the facts of this case, the Court should determine this issue first so that the constitutional issue may not need to be decided.

Finally, had counsel represented respondent when the petition for certiorari was filed (at which time respondent was *pro se*), counsel would have opposed the grant of the writ on the ground that the ruling of the court below was clearly supportable on the *Stovall-Simmons* ground. Not then having the opportunity so to urge, counsel presents the argument at this time to furnish the Court the opportunity to dismiss the writ as improvidently granted.

II.

APPELLEE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL WHEN EVIDENCE WAS INTRODUCED OF POST-INDICTMENT IDENTIFICATION PROCEEDINGS HELD ON THE EVE OF TRIAL WITHOUT HIS COUNSEL AND WHERE NO PRIOR LINEUP HAD BEEN CONDUCTED.

The Sixth Amendment guarantees to an accused "the right to the Assistance of Counsel for his defense." This Court has stated that this guarantee "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence' ". *United States v. Wade*, 388 U.S. 218, 225 (1967). The Court has found that such a meaningful defense requires counsel's presence in a diversity of situations and settings. *See, e.g., Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment proceedings at which available defenses could be lost if not claimed); *White v. Maryland*, 373 U.S. 59 (1963), and *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (custodial interrogation). And in *United States v. Wade*, 388 U.S. 219 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), the Court held that the right encompassed lineup

identifications. Although this court has recently limited that right to post-indictment situations, it did nevertheless reaffirm the accused's constitutional right to the presence of counsel at a lineup identification after indictment and hence after judicial proceedings had commenced. *Kirby v. Illinois*, 406 U.S. 682 (1972).

In the instant case, Mr. Ash was effectively denied that right to the assistance of counsel by the Government's unexplained failure to conduct a corporeal identification and the conducting of a photographic identification in its stead.[19] Mr. Ash was in custody in Washington, D.C. at the time of the indictment on the instant charge and indeed during the entire period that the investigation apparently focused upon him as a suspect in the bank robbery. All four of the Government's identification witnesses resided in the District area. Mr. Ash had available counsel long before the 1968 identification.[20] And a photographic identification held five and six months after the event for which Mr. Ash has since been convicted revealed that the witnesses could make only tentative identifications of him. At least one witness suggested seeing the suspect in corporeal form. Yet, despite all these circumstances, the Government conducted no lineup. Instead, on the eve of the trial, 33 months from the time of the crime and 28 months after

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[19] The factual statements in this argument have been fully developed in Argument I, *supra*. Record citations are therefore given only where new facts are developed or for other particular reasons.

[20] Indictment was filed on April 1, 1966. Counsel was appointed for Mr. Ash on April 18, 1966. Mr. Ash had counsel continuously from that date until after termination of trial in May 1968 (App. 1-8).

the first tentative photo identification, the Government showed what, it is submitted, are overtly suggestive pictures of Mr. Ash to the witnesses, in the absence of his counsel, for the purpose of effecting an identification. The less than fully certain identifications made at this highly prejudicial proceeding were then introduced into evidence.[21]

Thus, the issue before this Court is whether, in the circumstances of this case, Mr. Ash was denied the right to the assistance of counsel as that right has been enunciated in *Wade*, *Gilbert*, and *Kirby*. Respondent urges that where, as in the case at bar, a post-indictment identification has occurred in the absence of counsel when the accused was in custody and the witnesses were available, and particularly where no prior lineup had been held, the right to counsel is applicable, no matter how narrowly that right is construed.

We recognize that the majority of the circuits which have ruled on the issue of the right to counsel at photographic identifications have held that the right does not attach to such proceedings. See the cases collected in the Government's brief, pp. 19-20, and in the dissent of the court below (Pet. App. 35a nn. 16, 17). Only the United States Court of Appeals for the District of Columbia Circuit holds to the contrary (the instant case). Two states have agreed. *Commonwealth v. Whiting*, 439 Pa. 205, 266 A.2d 738, cert. den., 400 U.S. 919 (1970); *Thompson v. State*, 85 Nev. 134, 451 P.2d 704 (1969).

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[21] No argument is made here that *Wade* applies to the 1966 photo identification. *Stovall v. Denno*, 388 U.S. 293, 297 (1968); *Kirby v. Illinois*, 406 U.S. 682 (1972). Rather, the issue before this Court in this Argument goes solely to the 1968 photo identification.

However, we also note that, prior to this Court's ruling in *Wade*, only the Fifth Circuit had ruled favorably for the proposition that the right to counsel attached to a corporeal identification proceeding. *United States v. Wade*, 358 F.2d 557 (C.A. 5, 1966). Four other circuits had declined to recognize such a right. *United States v. Evans*, 359 F.2d 776 (C.A. 3) (per curiam), cert. den., 385 U.S. 863, 951 (1966); *United States ex rel. Stovall v. Denno*, 355 F.2d 731 (C.A. 2 1966), affirmed on other grounds, 388 U.S. 293 (1967); *Williams v. United States*, 120 U.S. App. D.C. 244, 345 F.2d 733, cert. den. 382 U.S. 962 (1965); *Caldwell v. United States*, 338 F.2d 385 (C.A. 8, 1964), cert. den., 380 U.S. 984 (1965).

Moreover, this Court has on a number of occasions adopted the minority view. *See, e.g., Kaufman v. United States*, 394 U.S. 217, 220 (1969) (sustaining the position taken by the 4th and 10th Circuits; rejecting the position taken by the 2d, 3d, 5th, 6th, 7th, 9th, and D.C. Circuits); *Simmons v. United States*, 390 U.S. 377, 392 (1968) (sustaining the position of the D.C. Circuit; rejecting that of the 4th, 5th, 7th, 8th, and 10th Circuits); *Putnam v. Commissioner*, 352 U.S. 82, 84 (1956) (sustaining the view of the 8th Circuit; rejecting that of the 3d, 5th, and 6th). Indeed, at least from the time of John Marshall, this Court and its members have not been reticent to hold as law doctrines that had little, if any, support in the then decided cases. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Baker v. Carr*, 369 U.S. 186 (1962).

A. The holding of the United States v. Wade is applicable to photographic identification in the circumstances of this case.

1. *The language and rationale of Wade encompasses post-indictment photographic identification.* Although the specific facts of *Wade* involved a post-indictment lineup proceeding, the language of this Court in *Wade*, the rationale it employed, as well as the evils it sought to dispel, indicate that the holding of *Wade* was not intended to and cannot rationally be confined to corporeal identifications but encompasses other forms of eyewitness identification as well. Thus, the Court declared, in explaining the dangers inherent in eyewitness identification and the concomitant need of the presence of counsel, "there is a serious difficulty in depicting what transpires at lineups *and other forms of identification confrontations.*" 388 U.S. at 230 (emphasis added). Again, the Court, in emphasizing the cause of these dangers, stated, in terms that focus on eyewitness identifications generally rather than on a particular form of such identification: "we assume they [the risks] derive from the dangers inherent in *eyewitness identification* and the suggestibility inherent in the context of pretrial identification." 388 U.S. at 235 (emphasis added). Likewise, Mr. Justice White, in his dissent in *Wade*, confirmed the scope of the Court's holding: "the rule applies to any lineup, *to any other techniques* employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone . . . ." 388 U.S. at 251 (emphasis added). See also *Commonwealth v. Whiting*, 439 Pa. 205, 209, 266 A.2d 738, 740, cert. den., 400 U.S. 919 (1970).

2. *Post-indictment photographic identification proceedings are a critical stage of the adversary system.*

The hallmark of *Wade* was the Court's determination that a post-indictment lineup was a critical stage of the adversary proceedings. 388 U.S. at 237. Although the Court did not delineate the boundaries of "critical stages," it did indicate the type of situations which were not to be construed as critical. Thus, "fingerprints, blood sample, clothing, hair, and the like" are not critical stages within the meaning of *Wade*. 388 U.S. at 227. They are not critical because there is still opportunity at trial through "cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." 388 U.S. at 227-28. It is instructive to note that this list of pretrial preparatory steps which is explicitly excluded by the Court from the arena of critical stages does not include any form of eyewitness identification—whether it be the lineup specifically condemned in *Wade*, the one-man showup criticized in *Stovall* absent exigent circumstances, or the post-custody photographic identification of the instant case. What separates these forms of eyewitness identification from the preparation stages excluded by *Wade* from the parameters of "critical stage" is the great risk that the absence of counsel "might derogate from his [accused's] right to a fair trial." 388 U.S. at 228. Whereas the admissible evidence concerning "fingerprints, blood sample, clothing, hair, and the like," is the physical, tangible object, which can be produced for the inspection of counsel and tangibly into the courtroom, and perhaps scientific, objective findings concerning the tangible object, the drama of the lineup and of the photographic identification contain much more. Either in corporeal or in photographic form, the identification contains the subjective conclusions of witnesses which can be affected by a myriad of diverse

factors that cannot be reproduced either for the inspection of counsel or for the courtroom. And as the Court said in *Wade*, "cross-examination cannot be viewed as an absolute assurance of accuracy and reliability." 388 U.S. at 235.

The *Wade* Court's paramount concern was with the accuracy of the guilt-determining process. The Court was clearly disturbed by the lack of reliability in the eyewitness identification procedure. The Court, citing extensively from a number of authorities, catalogued the dangers that inhere in such procedure. 388 U.S. at 228-35. It is not necessary here to traverse this all too familiar terrain. It is significant, however, that it was these dangers, and most notably that of the suggestive, improper influence--intentional or unintentional--that occur at eyewitness identification proceedings which caused this Court to deem such proceedings to be critical and thus to require the presence of counsel. Although the specific facts of *Wade* relate to a lineup, the Government has stated it most eloquently: "There is no meaningful difference between a witness' pretrial identification from photographs and a similar identification made at a lineup." Brief for Gov't. at 7, *United States v. Wade*, 388 U.S. 218 (1967). And the Government is absolutely right!

Admittedly the photos used in a photographic identification can be more easily preserved and made available to counsel than can the participants of a lineup. But to argue that a lineup therefore requires the presence of counsel and a photographic identification does not, is to miss the point of *Wade*. For a photograph made of a lineup can also be easily preserved for the inspection of counsel. See *United States v. Brown*, ___ U.S. App. D.C. ___, 461 F.2d 134 (1972). Yet this did not deter this

Court from holding in *Wade* that a lineup is a critical stage requiring counsel. For the Court was mindful of the kinds of suggestive influence that can surround an identification, irrespective of the fairness of the lineup or photo array itself. Thus, preservation of the photos would enable the attorney to consider only one factor of the identification—the array itself. It does not preserve the suggestive or improper influences that may have occurred at the identification proceeding.

A photographic identification is clearly no less critical a stage of the prosecution than is a lineup. In fact, the dangers which the Court found so distressing in the eyewitness identifications at lineups are present *to an even greater extent* at photographic identifications. First, photographic identifications are considered inferior to corporeal identifications and thus even less reliable than lineups. As Wall, *Eyewitness Identification*, cited extensively by this Court in *Wade*, points out: "[T]he use of photographs may have a serious effect upon the reliability of the identification of the suspect as the perpetrator of the crime. . . . [W]here a witness had made a photographic identification of a person, his subsequent corporeal identification of that same person is somewhat impaired in value, and its accuracy must be evaluated in light of the fact that he first saw a photograph. . . . Because of the inherent limitations of photography, which presents its subject in two dimensions rather that the three dimensions of reality, and which presents a "frozen" image, often not too similar to the image of the living, moving subject, . . . a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification." *Id.* at 67-70. See also *People v. Gould*, 54 Cal.2d 621, 354 P.2d 870 (1960); *United States v. Collins*, 416 F.2d 696, 701 (C.A.

4, 1969) (Winter, J., dissenting). *United States v. Brown*, ___ U.S. App. D.C. ___, 461 F.2d 134, 150-51 (1972) (Wright, J., dissenting).

In addition to their greater unreliability, photo identification procedures are more critical than corporeal identifications because the defendant is not present to verify the fairness of the proceedings. As the Government argued in its brief in *Wade*, at 24-25, if there is to be overreaching, it is much more likely to occur "when the accused is absent than when he himself is being 'used.'" *See also*, *United States v. Marson*, 408 F.2d 644, 653 (C.A. 4, 1968) (Winter, J., dissenting). [*Thompson v. State*, 85 Nev. 134, 137, 451 P.2d 704, 706 (1969)].

Thus the presence of counsel is even more crucial at the photographic identification than at the lineup.

There is the further danger that, once the witness makes a photo identification, he will be reluctant to retract it. *Wade*, 388 U.S. at 229, *United States v. Collins*, 416 F.2d 696, 701 (C.A. 4, 1969) (Winter, J., dissenting). This Court in *Simmons* recognized just such a danger, explaining that having viewed a picture "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen" committing the crime. 390 U.S. at 383-84; see also Wall, *Eyewitness Identification*, 68. Indeed, unlike a lineup where the figures are fairly distant and the facial features thus less distinct, the witness' closer study of the photograph allows that image to be etched even more firmly in the witness' mind, and thus is even more likely to replace the original memory that the witness had of the perpetrator of the crime.

Moreover, as this Court noted in Wade, 388 U.S. at 229, the dangers of eyewitness identification are heightened

when the witness' opportunity for observation was insubstantial, thereby making "his susceptibility to suggestion the greatest." This is precisely what occurred in the instant case. Two of the witnesses saw the robber but for a few seconds, and one of those was looking through a distorting tinted glass; the other two viewed him only with a mask covering most of his facial features. The decision in *Wade* was a result of the need to protect just such a suspect from the vagaries and inaccuracies of eyewitness identification. See *Wade*, 388 U.S. at 229; *Gilbert v. California*, 388 U.S. 263, 273 (1972); *Kirby*, 406 U.S. at 683. Yet, at the exact moment when counsel was needed to avert the prejudice of overly suggestive identification—and after this Court had recognized that right in *Wade*—the Government, with the prosecuting attorney in the lead, insured counsel's absence by conducting a photographic rather than a lineup proceeding. Surely if counsel had been present, the prejudice and taint would have been averted. Fundamental fairness to the accused could have been preserved and the interest of judicial economy served.[22]

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[22] It is of more than passing interest that the District of Columbia police reported in December 1971 that, since the Police Department promulgated uniform procedures under *Wade* for conducting police lineups, there had not to that date been a single case dismissed for improper *or suggestive* lineup identification. M.E. Pitts (Deputy Chief, Metropolitan Police Department, Washington, D.C.), "How Sound Is Your Police Lineup," *FBI Law Enforcement Bulletin* (Dec. 1971). And, as this Court well knows from the repeated press releases of the Police Department that have been reported in the press, this has been a period of substantially decreasing crime rates in the District of Columbia.

3. The right to counsel as enunciated in Wade is not contingent upon the presence of the accused.

The only real difference between *Wade* and *Ash* is that in the former the accused was present at the identification while in the latter he was not. However, the right to counsel as guaranteed by this Court in *Wade* was not made contingent upon the physical confrontation of the accused with his accusers. For, unlike *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964), in which the right to counsel was grounded on the accused's Fifth Amendment right not to incriminate himself, the Court in *Wade* explicitly denied to the accused a Fifth Amendment right not to participate in a lineup. In *Wade*, the accused's Sixth Amendment right was grounded solely on his right to assistance of counsel to protect himself from the unreliability inherent in eyewitness identifications. 388 U.S. at 221-23, 226. Thus, the fact that the accused is present in the lineup but not at the photographic identification proceeding is not significant in determining the parameters of his right to have the assistance of counsel at such a critical juncture of the adversary proceeding. Particularly is this so because the prejudice to the accused results not from his own actions but from the manipulations—intentional or unintentional—of others.

Moreover, since the accused is not complaining of a denial of the constitutional right to be confronted by witnesses against him, the presence or absence of a physical confrontation should make no difference in determining whether the accused is entitled to counsel when his accusers have arranged for an eyewitness identification. See *United States ex rel. Reed v. Anderson*, 461 F.2d 739, 750 (C.A. 3, 1972) (Hastie, J., concurring in part and dissenting in part).

4. The availability of cross-examination is not a satisfactory solution.

The Government contends that the right to cross-examination of those witnesses who are presenting the affirmative evidence of the out-of-court identification is a satisfactory safeguard against the admitted dangers of pretrial identification. The short answer of course is that this was not found to be a satisfactory solution in *Wade*. And an examination of the facts in the case at bar demonstrates that *Wade* was right and that the same reasoning applies to photographic as to corporeal identification.

It is true that in the instant case trial counsel was quite successful in eliciting from the witnesses a good deal of evidence of the suggestiveness of both the 1966 and the 1968 photo identifications. However, it must be noted that the material he had to work with was particularly easy for this purpose: the slight opportunity the witnesses had to observe at the scene of the crime, and their concomitant inability to describe the features of the perpetrators of that crime, the long time span from the observation to the viewing of the pictures, and the suggestiveness of the 1968 photographs themselves. Yet, one must wonder, how much else would be done to "refresh" memories of witnesses by a prosecuting attorney who—a year after *Stovall* and two months after *Simmons*—would not deem it inappropriate to use identification procedures as blatantly suggestive as the five photographs of the 1968 identification. Not that such acts would be done deliberately. Nuances, such as the order in which pictures are presented, the emphasis of voice, the glance, the gesture used, the exact words employed, can be unintentional as, one may believe, were the choice of the five photographs of the May 1968

identification. As one need not postulate bad faith to an eager advocate for the prosecution in the use of these photographs, one also need not assume bad faith in the choice of words, the lighting, the subtleties of which one who is not clearly aware may be guilty.

These are factors behind the *Wade* decision, and they are equally applicable here. How can counsel who was not there explore such matters? Should the prosecuting attorney who here presented the 1968 photographs to the witnesses have been examined under oath concerning his inflections, his facial gestures, his choice of particular words, details of which one may assume he was no more aware than he was of the impropriety, after *Stovall* and *Simmons* (if not before), of using subjects in an identification procedure that so clearly pointed the finger at the persons about to be tried? Should the witnesses have been expected to note all of these subtleties? Should defense counsel have asked each one of them a litany of questions concerning placement of eyebrows, intonation of voice, exact choice of words, and the like?

Nor is it any answer to point to the acquittal of co-defendant Mr. Bailey or to the indecisiveness of most of the identifications of Mr. Ash both at the viewing and in court. These results are just as consistent with the rationale that the witnesses were not as susceptible to the suggestiveness of the 1968 identification as they might have been. One can only wonder how much weaker their identifications would have been without the suggestiveness of which we know and without the suggestiveness of which, due to the absence of counsel, we cannot know!

It is submitted that the facts of this case clearly demonstrate why *Wade* was decided and that *Wade* is right. It was only after *Wade* that the District of Columbia police instituted uniform procedures to ensure

due process for corporeal identifications. The instant case demonstrates an attempt to avoid those strictures. The decision of the court below, applying *Wade* to all identification procedures, will ensure that the same results to which Deputy Police Chief Pitts has testified[23] concerning *some* identification procedures will ensue for *all*.

B. *Wade* does not require counsel in all photographic identifications, as it does not in all corporeal identifications.

The courts have declined to rule that an accused has an absolute Fifth or Sixth Amendment right to a lineup in lieu of a photographic identification. *United States v. Ravich*, 421 F.2d 1196, 1203 (C.A. 2, 1970); *cf. Simmons*. We do not urge a contrary position upon the Court as a constitutional mandate. In the circumstances of this case, it is not necessary for us to do so. Nor is it necessary to urge that this Court rule that the right to counsel at a photo identification must extend to all such identifications. Just as *Wade* does not apply to all corporeal identifications, so also it would not apply to all identifications by photograph. This Court made clear in *Kirby* that the right to counsel does not extend to pre-indictment corporeal identifications, for there the suspect most probably does not yet have counsel, the investigation most probably has not yet focused on one suspect to the exclusion of others, there is still need of speedy investigative and arresting steps (should the identification procedures demonstrate that the person being identified is not the perpetrator of the crime), and

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[23] See note 22, p. 39, *supra*.

the like. Similarly, the right to counsel in photographic identifications need not extend to situations in which the suspect is not readily available, perhaps because he is a fugitive, or where the witnesses are scattered in distant states, or other such exigent circumstances are present. This Court has drawn such distinctions in similar situations. See for example, *Stovall* where the Court noted the dangers of single-suspect corporeal identifications, but countenanced them under the "imperative" circumstances of that case. 388 U.S. at 302. Likewise, in *Simmons*, photo identification, though recognized to be second best and fraught with hazards, could be employed where the perpetrators were at large, the clues were still inconclusive so that arrests could bring ignominy to innocent persons, and it was necessary to determine "swiftly" whether the investigation was progressing "on the right track" so that officials could be properly deployed in Chicago or other cities. 390 U.S. at 384-85.

Regardless of its application to other situations of photographic identification, which of course must await further litigation, this case clearly demonstrates a situation in which *Wade* and *Kirby* apply. At the time of the May 1968 photo identification, the accused had been in custody for almost three years; 25 months had elapsed from the time of the indictment to the time of the identification; counsel had been retained (App. 5-7) and was readily available; at least one witness had indicated a desire to view this defendant in person; a prior photo identification proceeding had indicated that the witnesses' ability to recognize the gunman was highly speculative; no prior lineup had been held. The situation literally cried out for a corporeal identification. Under these circumstances, to fail to conduct such an identification a year after *Wade* and *Stovall* and two

months after *Simmons* could be nothing other than an attempted circumvention of the constitutional rights of the accused as enunciated by this Court in *Wade* and *Kirby*. The Government has come forward with no explanation for the failure to hold a lineup. As the Pennsylvania Supreme Court said in *Whiting*: "*Wade* cannot be undercut simply by substituting pictures for people, nor can the police prepare a witness for the lineup by privately showing the witness pictures of the accused." 439 Pa. at 209, 266 A.2d at 740. See also *United States v. Marson*, 408 F.2d 644, 654 (C.A. 4, 1968) (Winter, J., dissenting).

Indeed, under the facts of this case, holding of a photo identification in lieu of a lineup almost a year after *Wade* was decided, it is submitted, was an apparent subterfuge to avoid this Court's clear and decisive ruling that an accused has a right to counsel at a lineup. And as the prosecutor himself was the instigator (Agent Berry of the FBI testified: "I was accompanying Mr. Sepenuk [the Prosecuting Attorney] and he wished to have the witnesses view the photographs." (App. 32)), one cannot seek to excuse this action on the ground of ignorance of the law on the part of the police. If this Court were to allow such a practice to stand uncorrected, then it will in effect have overturned *sub silentio* its holdings in *Wade* and *Kirby*. It will pave the way for the anomalous situation in which the Government could avoid *Wade* by taking photos of the lineup in the absence of witnesses or of counsel and then showing them to witnesses without the presence of either the accused or his counsel. *United States ex rel. Reed v. Anderson*, 461 F.2d 739, 751 (C.A. 3, 1972) (Hastie, J., concurring in part and dissenting in part). It is unfathomable that this Court would lend its name to such a stratagem.

C. Presence of counsel at a post-indictment photographic identification where no prior lineup has been conducted is not an interference with the Government's preparation of its witnesses for trial.

Where a prior lineup has been held, and the Government uses photographs of the lineup to refresh the memories of its witnesses, no violation of *Wade* occurs. See *United States v. Brown*, ___ U.S. App. D.C. ___, 461 F.2d 134 (1972). Respondent does not ask this Court to fashion a rule to the contrary. However, there is a vast difference between the use of photographs of a lineup to refresh the memory of a witness who had made a positive identification at that lineup and the use of photos, as in the instant case, to effect an identification moments before trial. For the former is truly a refreshing of memory rather than an original production of affirmative evidence.

Moreover, application of the right to counsel in this case would not in any way imply that the accused's counsel should be present at the Government's pretrial preparation of its witnesses. What the witnesses say to the prosecutor at such preparation is *not* admissible into evidence as affirmative proof; but an identification made at such a session, from a lineup or from a photographic array, is admissible to prove the fact of identification. And, as Mr. Justice Harlan speaking for this Court, observed in *Simmons*, such identification can have a profound effect on the in-court identification. 390 U.S. at 383-84.

The rights enunciated in *Wade* and *Kirby* cannot be defeated by such red herrings. For clearly the preparation of the witnesses can be separated from the identification procedures. The safeguarding of the accused's right to counsel in the circumstance of this case will not result in

the presence of the defense attorney at every session held by the prosecutor with his witnesses; the Government's right to prepare its case in private will not be impinged upon.

However, should in a later day the Government's implications be shown to be correct (Brief of Gov't at 25-26, instant case) that photographic identifications are not substantively different from ordinary interviews of witnesses by prosecuting attorneys—as the Government was correct that photographic identifications do not differ in substance from corporeal identifications (Brief of Gov't at 7, *Wade*)—and if the dangers as demonstrated in this case are shown to exist in ordinary pretrial preparation, it will be time enough to consider whether constitutional protection requires counsel's presence in that situation as well. That is not this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

SHERMAN L. COHN

Attorney for Respondent
(Appointed by this Court)

September 1972

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* ASH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1255. Argued January 10, 1973—Decided June 21, 1973

The Sixth Amendment does not grant an accused the right to have counsel present when the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. A pretrial event constitutes a "critical stage" when the accused requires aid in coping with legal problems or help in meeting his adversary. Since the accused is not present at the time of the photographic display, and, as here, asserts no right to be present, there is no possibility that he might be misled by his lack of familiarity with the law or overpowered by his professional adversary. *United States* v. *Wade*, 388 U. S. 218, distinguished. Pp. 6–20.

149 U. S. App. D. C. 1, 461 F. 2d 92, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1255

United States, Petitioner, v. Charles J. Ash, Jr. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 21, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this case the Court is called upon to decide whether the Sixth Amendment[1] grants an accused the right to have counsel present whenever the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, held, by a 5-to-4 vote, that the accused possesses this right to counsel. 149 U. S. App. D. C. 1, 461 F. 2d 92 (1972). The court's holding is inconsistent with decisions of the courts of appeals of nine other circuits.[2] We granted certiorari

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[2] *United States* v. *Bennett*, 409 F. 2d 888, 896-900 (CA2), cert. denied *sub nom. Haywood* v. *United States*, 396 U. S. 852 (1969); *United States ex rel. Reed* v. *Anderson*, 461 F. 2d 739 (CA3, *en banc*, 1972); *United States* v. *Collins*, 416 F. 2d 696 (CA4), cert. denied, 396 U. S. 1025 (1970); *United States* v. *Ballard*, 423 F. 2d 127 (CA5 1970); *United States* v. *Serio*, 440 F. 2d 827, 829-830 (CA6 1971); *United States* v. *Robinson*, 406 F. 2d 64, 67 (CA7), cert. denied, 395 U. S. 926 (1969); *United States* v. *Long*, 449 F. 2d 288, 301-302 (CA8), cert. denied, 405 U. S. 974 (1972); *Allen* v. *Rhay*, 431 F. 2d 1160, 1166-1167 (CA9 1970); *McGee* v. *United States*, 402

to resolve the conflict and to decide this important constitutional question. 407 U. S. 909 (1972). We reverse and remand.

I

On the morning of August 26, 1965, a man with a stocking mask entered a bank in Washington, D. C., and began waving a pistol. He ordered an employee to hang up the telephone and instructed all others present not to move. Seconds later a second man, also wearing a stocking mask, entered the bank, scooped up money from tellers' drawers into a bag, and left. The gunman followed, and both men escaped through an alley. The robbery lasted three or four minutes.

F. 2d 434, 436 (CA10), cert. denied, 394 U. S. 908 (1969). The en *banc* decision of the Third Circuit in *Anderson* overruled in part a panel decision in *United States* v. *Zeller*, 427 F. 2d 1305 (CA3 1970).

The question has also produced conflicting decisions in state courts. The majority view, as in the courts of appeals, rejects the claimed right to counsel. See, *e. g.*, *McGhee* v. *State*, 264 So. 2d 560 (Ala. Crim. App. 1972); *State* v. *Yehling*, 108 Ariz. 323, 498 P. 2d 145 (1972); *People* v. *Lawrence*, 4 Cal. 3d 273, 481 P. 2d 212, cert. denied, 407 U. S. 909 (1972); *Reed* v. *State*, — Del. —, 281 A. 2d 142 (1971); *People* v. *Holiday*, 47 Ill. 2d 300, 265 N. E. 2d 634 (1970); *Baldwin* v. *State*, 5 Md. App. 22, 245 A. 2d 98 (1968) (dicta); *Commonwealth* v. *Ross*, — Mass. —, 282 N. E. 2d 70 (1972), vacated on other grounds and remanded, — U. S. — (1973); *Stevenson* v. *State*, 244 So. 2d 30 (Miss. 1971); *State* v. *Brookins*, 468 S. W. 2d 42 (Mo. 1971) (dicta); *People* v. *Coles*, 34 App. Div. 2d 1061, 312 N. Y. S. 2d 621 (1970) (dicta); *State* v. *Moss*, 187 Neb. 391, 191 N. W. 2d 543 (1971); *Drewry* v. *Commonwealth*, 213 Va. 186, 191 S. E. 2d 178 (1972); *State* v. *Nettles*, 81 Wash. 2d 205, 500 P. 2d 752 (1972); *Kain* v. *State*, 48 Wis. 2d 212, 179 N. W. 2d 777 (1970). Cf. *State* v. *Accor*, 277 N. C. 65, 175 S. E. 2d 583 (1970). Several state courts, however, have granted a right to counsel at photographic identifications. See, *e. g.*, *Cox* v. *State*, 219 So. 2d 762 (Fla. App. 1969) (video tapes); *People* v. *Anderson*, — Mich. —, — N. W. 2d — (1973); *Thompson* v. *State*, 88 Nev. 134, 451 P. 2d 704, cert. denied, 396 U. S. 903 (1969); *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A. 2d 738, cert. denied, 400 U. S. 919 (1970).

A Government informer, Clarence McFarland, told authorities that he had discussed the robbery with Charles J. Ash, Jr., the respondent here. Acting on this information, an FBI agent, in February 1966, showed five black-and-white mug shots, of Negro males of generally the same age, height, and weight, one of which was of Ash, to four witnesses. All four made uncertain identifications of Ash's picture. At this time Ash was not in custody and had not been charged. On April 1, 1966, an indictment was returned charging Ash and a co-defendant, John L. Bailey, in five counts related to this bank robbery, in violation of D. C. Code § 22–2901 and 18 U. S. C. § 2113 (a).

Trial was finally set for May 1968, almost three years after the crime. In preparing for trial, the prosecutor decided to use a photographic display to determine whether the witnesses he planned to call would be able to make in-court identifications. Shortly before the trial, an FBI agent and the prosecutor showed five color photographs to the four witnesses who previously had tentatively identified the black-and-white photograph of Ash. Three of the witnesses selected the picture of Ash, but one was unable to make any selection. None of the witnesses selected the picture of Bailey which was in the group. This post-indictment[3] identification provides the basis for respondent Ash's claim that he was denied the right to counsel at a "critical stage" of the prosecution.

No motion for severance was made, and Ash and Bailey were tried jointly. The trial judge held a hearing on the suggestive nature of the pretrial photographic

[3] Respondent Ash does not assert a right to counsel at the black-and-white photographic display in February 1966 because he recognizes that *Kirby* v. *Illinois*, 406 U. S. 682 (1972), forecloses application of the Sixth Amendment to events before the initiation of adversary criminal proceedings. Tr. of Oral Arg. 21–22; Brief for Respondent 32 n. 21.

displays.[4] The judge did not make a clear ruling on suggestive nature, but held that the Government had demonstrated by "clear and convincing" evidence that in-court identifications would be "based on observation of the suspect other than the intervening observation." App. 63–64.

At trial, the three witnesses who had been inside the bank identified Ash as the gunman, but they were unwilling to state that they were certain of their identifications. None of these made an in-court identification of Bailey. The fourth witness, who had been in a car outside the bank and who had seen the fleeing robbers after they had removed their masks, made positive in-court identifications of both Ash and Bailey. Bailey's counsel then sought to impeach this in-court identification by calling the FBI agent who had shown the color photographs to the witnesses immediately before trial. Bailey's counsel demonstrated that the witness who had identified Bailey in court had failed to identify a color photograph of Bailey. During the course of the examination, Bailey's counsel also, before the jury, brought out the fact that this witness had selected another man as one of the robbers. At this point the prosecutor became concerned that the jury might believe that the witness had selected a third person when, in fact, the witness had selected a photograph of Ash. After a conference at the bench, the trial judge ruled that all five color photographs would be admitted into evidence. The Court of Appeals held that this constituted the introduc-

[4] At this hearing both the black-and-white and color photographs were introduced as exhibits. App. 44. The FBI agents who conducted the pretrial displays were called as witnesses and were cross-examined fully. App. 10, 28. Two of the four witnesses who were expected to make in-court identifications also testified and were cross-examined concerning the photographic identifications. App. 55, 61.

tion of a post-indictment identification at the prosecutor's request and over the objection of defense counsel.[4]

McFarland testified as a Government witness. He said he had discussed plans for the robbery with Ash before the event and, later, had discussed the results of the robbery with Ash in the presence of Bailey. McFarland was shown to possess an extensive criminal record and a history as an informer.

The jury convicted Ash on all counts. It was unable to reach a verdict on the charges against Bailey, and his motion for acquittal was granted. Ash received concurrent sentences on the several counts, the two longest being 80 months to 12 years.

The five-member majority of the Court of Appeals held that Ash's right to counsel, guaranteed by the Sixth Amendment, was violated when his attorney was not given the opportunity to be present at the photographic displays conducted in May 1968 before the trial. The majority relied on this Court's lineup cases, *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), and on *Stovall* v. *Denno*, 388 U. S. 293 (1967).

The majority did not reach the issue of suggestiveness; their opinion implies, however, that they would order a remand for additional findings by the District Court. 149 U. S. App. D. C., at 7; 461 F. 2d, at 98. The majority refrained from deciding whether the in-court identifications could have independent bases, 149 U. S. App.

[4] The majority of the Court of Appeals concluded that Ash's counsel properly had preserved his objection to introduction of the photographs. 149 U. S. App. D. C., at 6 n. 6, 461 F. 2d, at 97 n. 6. Although the contrary view of the dissenting judges has been noted here by the Government, the majority's ruling on this issue is not asserted by the Government as a basis for reversal. Petition for Certiorari 4 n. 3; Brief for Petitioner 6 n. 6. Under these circumstances, we are not inclined to disturb the ruling of the Court of Appeals on this close procedural question. App. 104, 126–131.

D. C., at 14–15 and nn. 20, 21; 461 F. 2d, at 105–106 and nn. 20, 21, but expressed doubt that the identifications at the trial had independent origins.

Dissenting opinions, joined by four judges, disagreed with the decision of the majority that the photographic identification was a "critical stage" requiring counsel, and criticized the majority's suggestion that the in-court identifications were tainted by defects in the photographic identifications. 140 U. S. App. D. C., at 14–43; 461 F. 2d, at 106–134.

II

The Court of Appeals relied exclusively on that portion of the Sixth Amendment providing, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The right to counsel in Anglo-American law has a rich historical heritage, and this Court has regularly drawn on that history in construing the counsel guarantee of the Sixth Amendment. We re-examine that history in an effort to determine the relationship between the purposes of the Sixth Amendment guarantee and the risks of a photographic identification.

In *Powell* v. *Alabama*, 287 U. S. 45, 60–66 (1932), the Court discussed the English common law rule that severely limited the right of a person accused of a felony to consult with counsel at trial. The Court examined colonial constitutions and statutes and noted that "in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes." 287 U. S., at 64–65. The Sixth Amendment counsel guarantee, thus, was derived from colonial statutes and constitutional provisions designed to reject the English common law rule.

Apparently several concerns contributed to this rejection at the very time when countless other aspects of the common law were being imported. One consideration was the inherent irrationality of the English limitation. Since the rule was limited to felony proceedings, the result, absurd and illogical, was that an accused misdemeanant could rely fully on counsel, but the accused felon, in theory at least,[4] could consult counsel only on legal questions that the accused proposed to the court. See *Powell* v. *Alabama*, 287 U. S., at 60. English writers were appropriately critical of this inconsistency. See, for example, 4 W. Blackstone, Commentaries *355.

A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system. The function of counsel as a guide through complex legal technicalities long has been recognized by this Court. Mr. Justice Sutherland's well-known observations in *Powell* bear repeating here:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand

[4] Although the English limitation was not expressly rejected until 1836, the rule appears to have been relaxed in practice. 9 W. Holdsworth, History of English Law 235 (1926); 4 W. Blackstone, Commentaries *355–356.

of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U. S., at 69.

The Court frequently has interpreted the Sixth Amendment to assure that the "guiding hand of counsel" is available to those in need of its assistance. See, for example, *Gideon* v. *Wainwright*, 372 U. S. 335, 344-345 (1963), and *Argersinger* v. *Hamlin*, 407 U. S. 25, 31 (1972).

Another factor contributing to the colonial recognition of the accused's right to counsel was the adoption of the institution of the public prosecutor from the Continental inquisitorial system. One commentator has explained the effect of this development:

> "[E]arly in the eighteenth century the American System of judicial administration adopted an institution which was (and to some extent still is) unknown in England: while rejecting the fundamental juristic concepts upon which continental Europe's inquisitorial system of criminal procedure is predicated, the colonies borrowed one of its institutions, the public prosecutor, and grafted it upon the body of English (accusatorial) procedure embodied in the common law. Presumably, this innovation was brought about by the lack of lawyers, particularly in the newly settled regions, and by the increasing distances between the colonial capitals on the eastern seabord and the ever-receding western frontier. Its result was that, at a time when virtually all but treason trials in England were still in the nature of suits between private parties, the accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncrasies

> of juries, and, last but not least, the personnel of the court." F. Heller, The Sixth Amendment 20–21 (1951) (footnote omitted).

Thus an additional motivation for the American rule was a desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official. Mr. Justice Black, writing for the Court in *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938), spoke of this equalizing effect of the Sixth Amendment's counsel guarantee:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by an experienced and learned counsel."

This historical background suggests that the core purpose of the counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.[7] Later developments have led this Court

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[7] Similar concerns eventually led to abandonment of the common law rule in England. That rule originated at a time when counsel was said to be "hardly necessary" because expert knowledge of the law was not required at trial and systematic examination of witnesses had not yet developed. T. Plucknett, A Concise History of the Common Law 410 (1948).

Confrontation with legal technicalities became common at English trials when complex rules developed for attacking the indictment. *Ibid.* The English response was not an unlimited right to counsel, however, but was rather a right for counsel to argue only legal questions. See *Powell*, 287 U. S., at 60. A plea in abatement directed at insufficiency of the indictment, for example, allowed a prisoner to "pray counsel to be assigned to him to manage his exceptions and take more." 2 M. Hale, Pleas of the Crown *236 (1736).

Confrontation with a professional prosecutor arose in English treason trials before it appeared in ordinary criminal trials. See 1

to recognize that "Assistance" would be less than meaningful if it were limited to the formal trial itself.

This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both. In *Wade*, the Court explained the process of expanding the counsel guarantee to these confrontations:

> "When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed

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J. Stephen, History of the Criminal Law of England 348–350 (1883). In 1695 this imbalance in the adversary process was corrected by a statute granting prisoners the right to counsel at treason trials. 7 William III, c. 3 (1695). Hawkins explained that the professional ability of king's counsel motivated this reform because it had "been found by experience that prisoners have been often under great disadvantages from the want of counsel, in prosecutions of high treason against the king's person, which are generally managed for the crown with greater skill and zeal than ordinary prosecutions . . . ." 2 W. Hawkins, Pleas of the Crown 566 (Leach ed. 1787). The 1695 statute weakened the English rule and, after a century of narrowing practical application, see n. 6, *supra*, the rule was finally abrogated by statute in 1836. Prisoners' Counsel Act, 6 & 7 William IV, c. 114 (1836).

the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings." 388 U. S., at 224 (footnote omitted).

The Court consistently has applied an historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself.

Recent cases demonstrate the historical method of this expansion. In *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), and in *White* v. *Maryland*, 373 U. S. 59 (1963), the accused was confronted with the procedural system and was required, with definite consequences, to enter a plea. In *Massiah* v. *United States*, 377 U. S. 201 (1964), the accused was confronted by prosecuting authorities who obtained, by ruse and in the absence of defense counsel, incriminating statements. In *Coleman* v. *Alabama*, 399 U. S. 1 (1970), the accused was confronted by his adversary at a "critical stage" preliminary hearing at which the uncounseled accused could not hope to obtain so much benefit as could his skilled adversary.

The analogy between the unrepresented accused at the pretrial confrontation and the unrepresented defendant at trial, implicit in the cases mentioned above, was explicitly drawn in *Wade*:

> "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" 388 U. S., at 235–236.

Throughout this expansion of the counsel guarantee to trial-like confrontations, the function of the lawyer has remained essentially the same as his function at trial. In all cases considered by the Court, counsel has continued to act as a spokesmen for, or advisor to, the accused. The accused's right to the "Assistance of Counsel" has meant just that, namely, the right of the accused to have counsel acting as his assistant. In *Hamilton* and *White*, for example, the Court envisioned the lawyer as advising the accused on available defenses in order to allow him to plead intelligently. 368 U. S., at 54–55; 373 U. S., at 60. In *Massiah* counsel could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution. 377 U. S., at 205. Cf. *Miranda v. Arizona*, 384 U. S. 436, 466 (1966). In *Coleman* the skill of the lawyer in examining witnesses, probing for evidence, and making legal arguments was relied upon by the Court to demonstrate that, in the light of the purpose of the preliminary hearing under Alabama law, the accused required "Assistance" at that hearing. 399 U. S., at 9.

The function of counsel in rendering "Assistance" continued at the lineup under consideration in *Wade* and its companion cases. Although the accused was not confronted there with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused. Counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and as better able to reconstruct the events at trial. Counsel present at lineup would be able to remove disabilities of the accused in precisely the same fashion that counsel compensated for the disabilities of the layman at trial. Thus the Court mentioned that the accused's memory might be dimmed by "emotional tension," that the accused's credibility at

trial would be diminished by his status as defendant, and that the accused might be unable to present his version effectively without giving up his privilege against compulsory self-incrimination. 388 U. S., at 230–231. It was in order to compensate for these deficiencies that the Court found the need for the assistance of counsel.

This review of the history and expansion of the Sixth Amendment counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary. Against the background of this traditional test, we now consider the opinion of the Court of Appeals.

III

Although the Court of Appeals' majority recognized the argument that "a major purpose behind the right to counsel is to protect the defendant from errors that he himself might make if he appeared in court alone," the court concluded that "other forms of prejudice," mentioned and recognized in *Wade*, could also give rise to a right to counsel. 149 U. S. App. D. C., at 10, 461 F. 2d, at 101. These forms of prejudice were felt by the court to flow from the possibilities for mistaken identification inherent in the photographic display.[8]

[8] "[T]he dangers of mistaken identification from uncounseled lineup identifications set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications. These include, notably, the possibilities of suggestive influence or mistake—particularly where witnesses had little or no opportunity for detailed observation during the crime; the difficulty of reconstructing suggestivity—even greater when the defendant is not even present; the tendency of a witness's identification, once given under these circumstances, to be frozen. While these difficulties may be somewhat mitigated by preserving the photographs shown, it may also be said that a photograph can preserve the record of a lineup; yet this does not justify a lineup without counsel. The same may be said of the

We conclude that the dangers of mistaken identification, mentioned in *Wade*, were removed from context by the Court of Appeals and were incorrectly utilized as a sufficient basis for requiring counsel. Although *Wade* did discuss possibilities for suggestion and the difficulty for reconstructing suggestivity, this discussion occurred only after the Court had concluded that the lineup constituted a trial-like confrontation, requiring the "Assistance of Counsel" to preserve the adversary process by compensating for advantages of the prosecuting authorities.

The above discussion of *Wade* has shown that the traditional Sixth Amendment test easily allowed extension of counsel to a lineup. The similarity to trial was apparent, and counsel was needed to render "Assistance" in counterbalancing any "overreaching" by the prosecution.

After the Court in *Wade* held that a lineup constituted a trial-like confrontation requiring counsel, a more difficult issue remained in the case for consideration. The same changes in law enforcement that led to lineups and pretrial hearings also generated other events at which the accused was confronted by the prosecution. The Government had argued in *Wade* that if counsel was required at a lineup, the same forceful considerations would mandate counsel at other preparatory steps in the "gathering of the prosecution's evidence," such as, for particular example, the taking of fingerprints or blood samples. 388 U. S., at 227.

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opportunity to examine the participants as to what went on in the course of the identification, whether at lineup or on photograph. Sometimes this may suffice to bring out all pertinent facts, even at a lineup, but this would not suffice under *Wade* to offset the constitutional infringement wrought by proceeding without counsel. The presence of counsel avoids possibilities of suggestiveness in the manner of presentation that are otherwise ineradicable." 149 U. S. App. D. C., at 9–10, 461 F. 2d, at 100–101.

The Court concluded that there were differences. Rather than distinguishing these situations from the lineup in terms of the need for counsel to assure an equal confrontation at the time, the Court recognized that there were times when the subsequent trial would cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant. In other words, such stages were not "critical." Referring to fingerprints, hair, clothing, and other blood samples, the Court explained:

> "Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." 388 U. S., at 227–228.

The structure of *Wade*, viewed in light of the careful limitation of the Court's language to "confrontations,"[9] makes it clear that lack of scientific precision and inability to reconstruct an event are not the tests for requiring counsel in the first instance. These are, instead, the tests to determine whether confrontation with

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[9] The Court rather narrowly defined the issues under consideration: "The pretrial *confrontation* for purpose of identification may take the form of a lineup, also known as an 'identification parade' or 'showup,' as in the present case, or presentation of the suspect alone to the witness, as in *Stovall* v. *Denno*, *supra*. It is obvious that risks of suggestion attend either form of *confrontation* . . . . But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and *other forms of identification confrontations*." 388 U. S., at 229–230 (emphasis added). The photographic identification could hardly have been overlooked by inadvertence since the Government stressed the similarity between lineups and photographic identifications. Brief for petitioner in *Wade* 7, 14, 19, 24.

counsel at trial can serve as a substitute for counsel at the pretrial confrontation. If accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be "critical." The opinion of the Court even indicated that changes in procedure might cause a lineup to cease to be a "critical" confrontation:

> "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" 388 U. S., at 239 (footnote omitted).

See, however, 388 U.S., at 262 note.

The Court of Appeals considered its analysis complete after it decided that a photographic display lacks scientific precision and ease of accurate reconstruction at trial. That analysis, under *Wade*, however, merely carries one to the point where one must establish that the trial itself can provide no substitute for counsel if a pretrial confrontation is conducted in the absence of counsel. Judge Friendly, writing for the Second Circuit in *United States* v. *Bennett*, 409 F. 2d 888 (1969), recognized that the "criticality" test of *Wade*, if applied outside the confrontation context, would result in drastic expansion of the right to counsel:

> "None of the classical analyses of the assistance to be given by counsel, Justice Sutherland's in Powell v. Alabama . . . and Justice Black's in Johnson v. Zerbst . . . and Gideon v. Wainwright . . . suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when, as here, the defendant is under

arrest; counsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered. Many other aspects of the prosecution's interviews with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews, notably with alibi witnesses." 409 F. 2d, at 899–900.

We now undertake the threshhold analysis that must be addressed.

IV

A substantial departure from the historical test would be necessary if the Sixth Amendment were interpreted to give Ash a right to counsel at the photographic identification in this case. Since the accused himself is not present at the time of the photographic display, and asserts no right to be present, Brief for the Respondent 40, no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary. Similarly, the counsel guarantee would not be used to produce equality in a trial-like adversary confrontation. Rather, the guarantee was used by the Court of Appeals to produce confrontation at an event that previously was not analogous to an adversary trial.

Even if we were willing to view the counsel guarantee in broad terms as a generalized protection of the adversary process, we would be unwilling to go so far as to extend the right to a portion of the prosecutor's trial-preparation interviews with witnesses. Although photography is relatively new, the interviewing of witnesses before trial is a procedure that predates the Sixth Amendment. In England in the 16th and 17th centuries counsel regularly interviewed witnesses before trial. 9

W. Holdsworth, History of English Law 226–228 (1926). The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

That adversary mechanism remains as effective for a photographic display as for other parts of pretrial interviews.[10] No greater limitations are placed on defense counsel in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution.[11] Selection of the picture of a person other than the accused, or the inability of a witness to make any selection, will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution.[12] In this very case, for example, the initial

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[10] Duplication by defense counsel is a safeguard that normally is not available when a formal confrontation occurs. Defense counsel has no statutory authority to conduct a preliminary hearing, for example, and defense counsel will generally be prevented by practical considerations from conducting his own lineup. Even in some confrontations, however, the possibility of duplication may be important. The Court noted this in holding that the taking of handwriting exemplars did not constitute a "critical stage":

"If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts." *Gilbert* v. *California*, 388 U. S., at 267.

[11] We do not suggest, of course, that defense counsel has any greater freedom than the prosecution to abuse the photographic identification. Evidence of photographic identifications conducted by the defense may be excluded as unreliable under the same standards that would be applied to unreliable identifications conducted by the Government.

[12] The Court of Appeals deemed it significant that a photographic identification is admissible as substantive evidence, whereas other parts of interviews may be introduced only for impeachment. 149

tender of the photographic display was by Bailey's counsel, who sought to demonstrate that the witness had failed to make a photographic identification. Although we do not suggest that equality of access to photographs removes all potential for abuse,[13] it does remove any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee.

The argument has been advanced that requiring counsel might compel the police to observe more scientific procedures or might encourage them to utilize corporeal rather than photographic displays.[14] This Court has recognized that improved procedures can minimize the

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U. S. App. D. C., at 10, 461 F. 2d, at 101. In this case defense counsel for Bailey introduced the inability to identify, and that was received into evidence. Thus defense counsel still received benefits equivalent to those available to the prosecution. Although defense counsel may be concerned that repeated photographic displays containing the accused's picture as the only common characteristic will tend to promote identification of the accused, the defense has other balancing devices available to it, such as the use of a sufficiently large number of photographs to counteract this possibility.

[13] Although the reliability of in-court identifications and the effectiveness of impeachment may be improved by equality of access, we do not suggest that the prosecution's photographic identification would be more easily reconstructed at trial simply because defense counsel could conduct his own photographic display. But, as we have explained, *supra*, at 15, the possibility of perfect reconstruction is relevant to the evaluation of substitutes for counsel, not to the initial designation of an event as a "critical stage."

[14] Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods, 38 Brooklyn L. Rev. 261, 299 (1971); Comment, 43 N. Y. U. L. Rev. 1019, 1022 (1968); Note, 2 Rutgers-Camden L. J. 347, 359 (1970); Note, 21 Syracuse L. Rev. 1235, 1241–1242 (1970). A variant of this argument is that photographic identifications may be used to circumvent the need for counsel at lineups. Brief for Respondent 44–45.

dangers of suggestion. *Simmons* v. *United States*, 390 U. S. 377, 386, n. 6 (1968). Commentators have also proposed more accurate techniques.[15]

Pretrial photographic identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor,[16] who, as so often has been said, may "strike hard blows" but not "foul ones." *Berger* v. *United States*, 295 U. S. 78, 88 (1935); *Brady* v. *Maryland*, 373 U. S. 83, 87–88 (1963). If that safeguard fails, review remains available under due process standards. See *Giglio* v. *United States*, 405 U. S. 150 (1972); *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935); *Miller* v. *Pate*, 386 U. S. 1 (1967); *Chambers* v. *Mississippi*, 410 U. S. —— (1973). These same safeguards apply to misuse of photographs. See *Simmons* v. *United States*, 390 U. S., at 384.

We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.

We hold, then, that the Sixth Amendment does not grant the right to counsel at photographic displays con-

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[15] *E. g.*, P. Wall, Eyewitness Identification in Criminal Cases 77–85 (1965); Sobel, *supra*, n. 12, at 309–310; Comment, 56 Iowa L. Rev. 408, 420–421 (1970).

[16] Throughout a criminal prosecution the prosecutor's ethical responsibility extends, of course, to supervision of any continuing investigation of the case. By prescribing procedures to be used by his agents and by screening the evidence before trial with a view to eliminating unreliable identifications, the prosecutor is able to minimize abuse in photographic displays even if they are conducted in his absence.

ducted by the Government for the purpose of allowing a witness to attempt an identification of the offender. This holding requires reversal of the judgment of the Court of Appeals. Although respondent Ash has urged us to examine this photographic display under the due process standard enunciated in *Simmons* v. *United States*, 390 U. S., at 384, the Court of Appeals, expressing the view that additional findings would be necessary, refused to decide the issue. 149 U. S. App. D. C., at 7, 461 F. 2d, at 98. We decline to consider this question on this record in the first instance. It remains open, of course, on the Court of Appeals' remand to the District Court.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 71-1255

United States, Petitioner, v. Charles J. Ash, Jr. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 21, 1973]

MR. JUSTICE STEWART, concurring in the judgment.

The issue in the present case is whether, under the Sixth Amendment, a person who has been indicted is entitled to have a lawyer present when prosecution witnesses are shown the person's photograph and asked if they can identify him.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This Court's decisions make it clear that a defendant is entitled to the assistance of counsel not only at the trial itself, but at all "critical stages" of his "prosecution." See *Coleman* v. *Alabama*, 399 U. S. 1; *United States* v. *Wade*, 388 U. S. 218; *Gilbert* v. *California*, 388 U. S. 263; *Hamilton* v. *Alabama*, 368 U. S. 52. The requirement that there be a "prosecution," means that this constitutional "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [an accused]. . . . It is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Kirby* v. *Illinois*, 406 U. S. 682, 688, 690 (plurality opinion). Since the photographic identification in the present case occurred after the accused had been indicted, and thus clearly after adversary judicial proceedings had been initiated, the only ques-

tion is whether that procedure was such a "critical stage" that the Constitution required the presence of counsel.

In *United States* v. *Wade, supra*, the Court determined that a pretrial proceeding is a "critical stage" if "the presence of . . . counsel is necessary to preserve the defendant's . . . right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." 388 U. S., at 227. Pretrial proceedings are "critical," then, if the presence of counsel is essential "to protect the fairness of the trial itself." *Schneckloth* v. *Bustamonte*, — U. S. —, —; cf. *Coleman* v. *Alabama*, 399 U. S. 1, 27–28 (STEWART, J., dissenting).

The Court held in *Wade* that a post-indictment, pretrial lineup at which the accused was exhibited to identifying witnesses was such a critical stage, because of the substantial possibility that the accused's right to a fair trial would otherwise be irretrievably lost. The hazard of unfair suggestive influence at a lineup, which, because of the nature of the proceeding, could seldom be reconstructed at trial, left little doubt, the Court thought, "that for *Wade* the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" 388 U. S., at 237.

The Court stressed in *Wade* that the danger of mistaken identification at trial was appreciably heightened by the "degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Id.*, at 228. There are numerous and subtle possibilities for such improper suggestion in the dynamic context of a lineup. Judge Wilkey, dissenting in the present case, accurately described a lineup as

> "a little drama, stretching over an appreciable span of time. The accused is there in the flesh, three-

dimensional and always full-length. Further, he isn't merely there, he acts. He walks on stage, he blinks in the glare of lights, he turns and twists, often muttering aside to those sharing the spotlight. He can be required to utter significant words, to turn a profile or back, to walk back and forth, to doff one costume and don another. All the while the potentially identifying witness is watching, a prosecuting attorney and a police detective at his elbow, ready to record the witness's every word and reaction." 461 F. 2d 92, 108.

With no attorney for the accused present at this "little drama," defense counsel at trial could seldom convincingly discredit a witness' courtroom identification by showing it to be based on an impermissibly suggestive lineup. In addition to the problems posed by the fluid nature of a lineup, the Court in *Wade* pointed out that neither the witnesses nor the lineup participants were likely to be alert for suggestive influences or schooled in their detection. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." 388 U. S., at 231–232.

The Court held, therefore, that counsel was required at a lineup, primarily as an observer, to ensure that defense counsel could effectively confront the prosecution's evidence at trial. Attuned to the possibilities of suggestive influences, a lawyer could see any unfairness at a lineup, question the witnesses about it at trial, and effectively reconstruct what had gone on for the benefit of the jury or trial judge.*

*I do not read *Wade* as requiring counsel because a lineup is a "trial-type" situation, nor do I understand that the Court required the presence of an attorney because of the advice or assistance he could give to his client at the lineup itself. Rather, I had thought the

A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial. It is true that the defendant's photograph may be markedly different from the others displayed, but this unfairness can be demonstrated at trial from an actual comparison of the photographs used or from the witness' description of the display. Similarly, it is possible that the photographs could be arranged in a suggestive manner, or that by comment or gesture the prosecuting authorities might single out the defendant's picture. But these are the kinds of overt influence that a witness can easily recount and that would serve to impeach the identification testimony. In short, there are few possibilities for unfair suggestiveness—and those rather blatant and easily reconstructed. Accordingly, an accused would not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was not present at the photographic display. For this reason, a photographic display cannot fairly be considered a "critical stage" of the prosecution. As the Court of Appeals for the Third Circuit aptly concluded:

> "If . . . the identification is not in a live lineup at which defendant may be forced to act, speak or dress in a suggestive way, where the possibilities for suggestion are multiplied, where the ability to reconstruct the events is minimized, and where the effect of a positive identification is likely to be permanent, but at a viewing of immobile photographs easily reconstructible, far less subject to subtle sug-

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reasoning of *Wade* was that the right to counsel is essentially a protection for the defendant at trial, and that counsel is necessary at a lineup in order to ensure a meaningful confrontation and the effective assistance of counsel at trial.

gestion, and far less indelible in its effect when the witness is later brought face to face with the accused, there is even less reason to denominate the procedure a critical stage at which counsel must be present." *United States ex rel. Reed* v. *Anderson*, 461 F. 2d 739, 745.

Preparing witnesses for trial by checking their identification testimony against a photographic display is little different, in my view, from the prosecutor's other interviews with the victim or other witnesses before trial. See *United States* v. *Bennett*, 409 F. 2d 888, 900. While these procedures can be improperly conducted, the possibility of irretrievable prejudice is remote, since any unfairness that does occur can usually be flushed out at trial through cross-examination of the prosecution witnesses. The presence of defense counsel at such pretrial preparatory sessions is neither appropriate nor necessary under our adversary system of justice "to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *United States* v. *Wade*, *supra*, at 227.

SUPREME COURT OF THE UNITED STATES

No. 71–1255

United States, Petitioner, v. Charles J. Ash, Jr.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 21, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds today that a pretrial display of photographs to the witnesses of a crime for the purpose of identifying the accused, unlike a lineup, does not constitute a "critical stage" of the prosecution at which the accused is constitutionally entitled to the presence of counsel. In my view, today's decision is wholly unsupportable in terms of such considerations as logic, consistency and, indeed, fairness. As a result, I must reluctantly conclude that today's decision marks simply another[1] step towards the complete evisceration of the fundamental constitutional principles established by this Court, only six years ago, in *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967); and *Stovall* v. *Denno*, 388 U. S. 293 (1967). I dissent.

I

On the morning of August 26, 1965, two men wearing stocking masks robbed the American Security and Trust Company in Washington, D. C. The robbery lasted only about three or four minutes and, on the day of the crime, none of the four witnesses was able to give the police a description of the robbers' facial characteristics. Some

[1] See *Kirby* v. *Illinois*, 406 U. S. 682 (1972).

five months later, on February 3, 1966, an FBI agent showed each of the four witnesses a group of black and white mug shots of the faces of five black males, including respondent, all of generally the same age, height and weight. Respondent's photograph was included because of information received from a Government informant charged with other crimes.[1] None of the witnesses was able to make a "positive" identification of respondent.[2]

On April 1, 1966, an indictment was returned charging respondent and a co-defendant in five counts relating to the robbery of the American Security and Trust Company. Trial was finally set for May 8, 1968, almost three years after the crime and more than two years after the return of the indictment. During the entire two-year period between indictment and trial, although one of the witnesses expressly sought an opportunity to see respondent in person, the Government never attempted to arrange a corporeal lineup for the purposes of identification. Rather, *less than 24 hours before trial*, the FBI agent, accompanied by the prosecutor, showed five

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[1] At the time of respondent's trial, the informant, one Clarence McFarland, was serving a sentence for bank robbery. According to the Court of Appeals, "McFarland had been before the grand jury with regard to five separate offenses, in addition to his bank robbery, and had not been indicted on any of them, including one in which he had confessed guilt. The Assistant United States Attorney had arranged to have McFarland transferred from the D. C. Jail to a local jail in Rockville, Maryland, and in addition had helped McFarland's wife move from Southeast Washington to an apartment near the parochial school that McFarland's children were due to attend." 461 F. 2d 92, 97 n. 7 (1972). The Assistant United States Attorney also testified that he "had indicated he would testify before the parole board in McFarland's behalf." *Id.*, at 97.

[2] Respondent does not contend that he was denied his Sixth Amendment right to counsel at the pre-indictment display of the black and white photographs. Tr. of Oral Arg. 21–22; Brief for Respondent 32 n. 21.

color photographs to the witnesses, three of whom identified the picture of respondent.

At trial, all four witnesses made in-court identifications of respondent, but only one of these witnesses was "positive" of her identification. The fact that three of the witnesses had previously identified respondent from the color photographs, and the photographs themselves, were also admitted into evidence. The only other evidence implicating respondent in the crime was the testimony of the Government informant.[4] On the basis of this evidence, respondent was convicted on all counts of the indictment.

On appeal, the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, reversed respondent's conviction. 461 F. 2d 92 (1972). Noting that "the dangers of mistaken identification from uncounseled lineup identifications . . . are applicable in large measure to photographic as well as corporeal identifications,"[5] the Court of Appeals reasoned that this Court's decisions in *Wade*, *Gilbert*, and *Stovall*, compelled the conclusion that a pretrial photographic identification, like a lineup, is a "critical" stage of the prosecution at which the accused is constitutionally entitled to the attendance of counsel. Accordingly, the Court of Appeals held that respondent was denied his Sixth Amendment right to "the Assistance of Counsel for his defense" when his attorney was not given an opportunity to attend the display of the color photographs on the very eve of trial.[6]

[4] As the Court of Appeals noted, this testimony was of at least questionable credibility. See n. 2, *supra*.

[5] 461 F. 2d, at 100.

[6] The Court of Appeals also noted "that there are at the very least strong elements of suggestiveness in this color photo confrontation," and that "it is hard to see how the Government can be held to have shown, by clear and convincing evidence, that these color photographs did not affect the in-court identification made one day later." 461 F. 2d, at 98, 105 n. 20.

In my view, both the reasoning and conclusion of the Court of Appeals were unimpeachably correct, and I would therefore affirm.

II

In June 1967, this Court decided a trilogy of "lineup" cases which brought into sharp focus the problems of pretrial identification. See *United States* v. *Wade*, *supra*; *Gilbert* v. *California*, *supra*; *Stovall* v. *Denno*, *supra*. In essence, those decisions held (1) that a pretrial lineup is a "critical stage" in the criminal process at which the accused is constitutionally entitled to the presence of counsel; (2) that evidence of an identification of the accused at such an uncounseled lineup is *per se* inadmissible; and (3) that evidence of a subsequent in-court identification of the accused is likewise inadmissible unless the Government can demonstrate by clear and convincing evidence that the in-court identification was based upon observations of the accused independent of the prior uncounseled lineup identification. The considerations relied upon by the Court in reaching these conclusions are clearly applicable to photographic as well as corporeal identifications. Those considerations bear repeating here in some detail, for they touch upon the very heart of our criminal justice system—the right of an accused to a fair trial, including the effective "Assistance of Counsel for his defense."

At the outset, the Court noted that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *United States* v. *Wade*, *supra*, at 228. Indeed, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Ibid.* Apart from "the dangers inherent in eyewitness identification," such as unreliable memory or perception, the Court pointed out that "[a] major factor contributing

to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Ibid.* The Court recognized that the dangers of suggestion are not necessarily due to "police procedures intentionally designed to prejudice an accused." *Id.*, at 235. On the contrary, "[s]uggestion can be created intentionally or unintentionally in many subtle ways." *Id.*, at 229. And "'[T]he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense . . . involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way . . . .'" *Id.*, at 235, quoting Williams and Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 470, 483.

The Court also expressed concern over the possibility that a mistaken identification at a pretrial lineup might itself be conclusive on the question of identity, thereby resulting in the conviction of an innocent man. The Court observed that "'once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'" *United States* v. *Wade*, *supra*, at 229, quoting Williams and Hammelmann, *supra*, at 482.

Moreover, "the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial." *Wade* v. *United States*, *supra*, at 230. For "as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups . . . ." *Ibid.* Although the accused is present at such corporeal identifications, he is hardly in a position to detect many of the more subtle "improper influences" that might in-

fect the identification.' In addition, the Court emphasized that "neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences." *Id.*, at 230. As a result, "even though cross-examination is a precious safeguard to a fair trial, it cannot [in this context] be viewed as an absolute assurance of accuracy and reliability." *Id.*, at 235.

With these considerations in mind, the Court reasoned that "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 231–232. And "[i]nsofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." *Id.*, at 235. Thus, noting that "presence of counsel [at the lineup] can often avert prejudice and assure a meaningful confrontation at trial," the Court concluded that a pretrial corporeal identification is "a critical stage of the prosecution at which [the accused is] 'as much entitled to such

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[7] The Court pointed out that "[i]mproper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present." *United States* v. *Wade*, *supra*, at 230–231.

aid [of counsel] . . . as at the trial itself.'" *Id.*, at 236, 237, quoting *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932).

III

As the Court of Appeals recognized, "the dangers of mistaken identification . . . set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications." 461 F. 2d, at 100. To the extent that misidentification may be attributable to a witness' faulty memory or perception, or inadequate opportunity for detailed observation during the crime, the risks are obviously as great at a photographic display as at a lineup.[8] But "[b]ecause of the inherent limitations of photography, which presents its subject in two dimensions rather than the three dimensions of reality, . . . a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification." P. Wall, Eye-Witness Identification in Criimnal Cases 70 (1965). Indeed, noting "the hazards of initial identification by photograph," we have expressly recognized that "a corporeal identification . . . is normally more accurate" than a photographic identification. *Simmons* v. *United States*, 390 U. S. 377, 384, 386 n. 6 (1968).[9] Thus, in this sense at

[8] Thus, "[a] witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures . . . there is some danger that the witness may make an incorrect identification." *Simmons* v. *United States*, 390 U. S. 377, 383 (1968).

[9] See also Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods, 38 Brooklyn L. Rev. 261, 264, 296 (1971); Williams, Identification Parades, [1955] Crim. L. Rev. 525, 531; Comment, Photographic Identification: The Hidden Persuader, 56 Iowa L. Rev. 408, 419 (1970); Note, Pretrial Photographic Identification—A "Critical Stage" of Criminal Proceedings?, 21 Syracuse L. Rev. 1235, 1241

least, the dangers of misidentification are even greater at a photographic display than at a lineup.

Moreover, as in the lineup situation, the possibilities for impermissible suggestion in the context of a photographic display are manifold. See *Simmons* v. *United States*, *supra*, at 383. Such suggestion, intentional or unintentional, may derive from three possible sources. First, the photographs themselves might tend to suggest which of the pictures is that of the suspect. For example, differences in age, pose, or other physical characteristics of the persons represented, and variations in the mounting, background, lighting or markings of the photographs all might have the effect of singling out the accused.[10]

Second, impermissible suggestion may inhere in the manner in which the photographs are displayed to the witness. The danger of misidentification is, of course, "increased if the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." *Simmons* v. *United States*, *supra*, at 383. And if the photographs are arranged in an asymetrical pattern, or if they are displayed in a time sequence that tends to emphasize a particular photograph, "any identification of the photograph which stands out from the rest is no more reliable than an identification of a single photograph, exhibited alone." P. Wall, *supra*, at 81.

(1970). Indeed, recognizing the superiority of corporeal to photographic identifications, English courts have long held that once the accused is in custody, pre-lineup photographic identification is "indefensible" and grounds for quashing the conviction. *Rex* v. *Haslom*, 19 Crim. App. Rep. 59, 60 (1925); *Rex* v. *Goss*, 17 Crim. App. Rep. 196, 197 (1923). See also P. Wall, Eye-Witness Identification in Criminal Cases 71 (1965).

[10] See, *e. g.*, Comment, *supra*, n. 9, at 410–411; Note, 43 N. Y. U. L. Rev. 1019, 1021 (1968).

Third, gestures or comments of the prosecutor at the time of the display may lead an otherwise uncertain witness to select the "correct" photograph. For example, the prosecutor might "indicate to the witness that [he has] other evidence that one of the persons pictured committed the crime," [11] and might even point to a particular photograph and ask whether the person pictured "looks familiar." More subtly, the prosecutor's inflection, facial expressions, physical motions and myriad other almost imperceptible means of communication might tend, intentionally or unintentionally, to compromise the witness' objectivity. Thus, as is the case with lineups, "[i]mproper photographic identification procedures, . . . by exerting a suggestive influence upon the witnesses, can often lead to an erroneous identification . . . ." P. Wall, *supra*, at 89.[12] And "[r]egardless

[11] *Simmons* v. *United States*, *supra*, at 383.

[12] The Court maintains that "the ethical responsibility of the prosecutor" is in itself a sufficient "safeguard" against impermissible suggestion at a photographic display. See *ante*, at 20. The same argument might, of course, be made with respect to lineups. Moreover, it is clear that the "prosecutor" is not always present at such pretrial displays. Indeed, in this very case, one of the four eyewitnesses was shown the color photographs on the morning of trial by an agent of the FBI, *not* in the presence of the "prosecutor." See 461 F. 2d, at 96. And even though "the ethical responsibility of the prosecutor" might be an adequate "safeguard" against *intentional* suggestion, it can hardly be doubted that a "prosecutor" is, after all, only human. His behavior may be fraught with wholly *unintentional* and indeed unconscious nuances that might effectively suggest the "proper" response. See P. Wall, *supra*, n. 9, at 26–65; Napley, Problems of Effecting the Presentation of the Case for a Defendant, 66 Colum. L. Rev. 94, 98–99 (1966); Williams & Hammelman, Identification Parades, Part I [1963] Crim. L. Rev. 479, 483. See also *United States* v. *Wade*, *supra*, at 229, 235, 236. And, of course, as *Wade* itself makes clear, unlike other forms of unintentional prosecutorial "manipulation," even unintentional suggestiveness at an identification procedure involves serious risks of "freezing"

of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen. . . ." *Simmons* v. *United States*, *supra*, at 383–384.[12] As a result, "'the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'" *Wade* v. *United States*, *supra*, at 229, quoting Williams and Hammelmann, *supra*, at 482.

Moreover, as with lineups, the defense can "seldom reconstruct" at trial the mode and manner of photographic identification. It is true, of course, that the photographs used at the pretrial display might be preserved for examination at trial. But "it may also be said that a photograph can preserve the record of a lineup; yet this does not justify a lineup without counsel." 461 F. 2d, at 100–101. *Cf. United States* v. *Wade*, *supra*, at 239 and n. 30. Indeed, in reality, preservation of the photographs affords little protection to the unrepresented accused. For although retention of the photographs may mitigate the dangers of misidentification due to the suggestiveness of the photographs themselves, it cannot in any sense reveal to defense counsel the more subtle, and therefore more dangerous, suggestiveness that might derive from the manner in which the photographs were displayed or any accompanying comments or gestures. Moreover, the accused cannot rely upon the witnesses themselves to expose these latter sources of suggestion, for the witnesses are not "apt to be alert for conditions prejudicial to the suspect. And if they were, it would be of scant benefit to the suspect"

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the witness' mistaken identification and creates almost insurmountable obstacles to reconstruction at trial.

[12] See also P. Wall, *supra*, n. 9, at 68; Napley, *supra*, n. 12, at 98–99; Williams & Hammelmann, *supra*, n. 12, at 484; Comment, *supra*, n. 9, at 411–413; Note, *supra*, n. 10, at 1023.

since the witnesses are hardly "likely to be schooled in the detection of suggestive influences." *United States v. Wade, supra*, at 230.

Finally, and *unlike* the lineup situation, the accused himself is not even present at the photographic identification, thereby reducing the likelihood that irregularities in the procedures will ever come to light. Indeed, in *Wade*, the Government itself observed: [14]

> "When the defendant is present—as he is during a lineup—he may personally observe the circumstances, report them to his attorney, and (if he chooses to take the stand) testify about them at trial . . . . [I]n the absence of an accused, on the other hand, there is no one present to verify the fairness of the interview or to report any irregularities. If the prosecution were tempted to engage in 'sloppy or biased or fraudulent' conduct, . . . it would be far more likely to do so when the accused is absent than when he is himself being 'used.'"

Thus, the difficulties of reconstructing at trial an uncounseled photographic display are at least equal to, and possibly greater than, those involved in reconstructing an uncounseled lineup.[15] And, as the Government ar-

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[14] Brief for United States 24–25, in *United States v. Wade, supra*.

[15] The Court's assertion, *ante*, at 17–18 and n. 10, that these difficulties of reconstruction are somehow minimized because the defense can "duplicate" a photographic identification reflects a complete misunderstanding of the issues in this case. Aside from the fact that lineups can also be "duplicated," the Court's assertion is wholly inconsistent with the underlying premises of both *Wade* and *Gilbert*. For unlike the Court today, the Court in both of those decisions recognized a critical difference between "systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like," on the one hand, and eyewitness identification, on the other. *United States v. Wade, supra*, at 227; *Gilbert v. California, supra*, at 267. In essence, the Court noted in *Wade* and *Gilbert* that, in the former situations, the accused can preserve his

gued in *Wade*, in terms of the need for counsel, "[t]here is no meaningful difference between a witness' pretrial identification from photographs and a similar identification made at a lineup."[14] For in both situations, "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the [pretrial identification] may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identi-

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right to a fair trial simply by "duplicating" the tests of the Government, thereby enabling him to expose any errors in the Government's analysis. Such "duplication" is possible, however, *only* because the accused's tests can be made *independently* of those of the Government—that is, any errors in the Government's analyses cannot affect the reliability of the accused's tests. That simply is not the case, however, with respect to eyewitness identifications, whether corporeal or photographic. Due to the "freezing effect" recognized in *Wade*, once suggestion has tainted the identification, its mark is virtually indelible. For once a witness has made a mistaken identification, "'he is not likely to back on his work later on.'" *United States* v. *Wade*, *supra*, at 229. As a result, any effort of the accused to "duplicate" the initial photographic display will almost necessarily lead to a reaffirmation of the initial misidentification.

The Court's related assertion, that "equality of access" to the results of a Government-conducted photographic display "remove[s] any inequality in the adversary process," *ante*, at 17–19, is similarly flawed. For due to the possibilities for suggestion, intentional or unintentional, the so-called "equality of access" is, in reality, skewed sharply in favor of the prosecution.

[14] Brief for United States 7, in *United States* v. *Wade*, *supra*. The Court seems to suggest that, under no circumstances, would it be willing "to go as far as to extend the right [to counsel] to a portion of the prosecutor's trial preparation interviews with witnesses." *Ante*, at 17. This suggestion illustrates once again the Court's readiness in this area to ignore "real-world" considerations for the sake of "mere formalism." *Kirby* v. *Illinois*, *supra*, at 699 (Brennan, J., dissenting). Moreover, this suggestion demonstrates the Court's failure to appreciate the essential differences, outlined persuasively by the Court of Appeals, between "the prosecutor's trial-preparation interviews with witnesses" and pretrial identification procedures. See 461 F. 2d, at 101.

fication." *United States* v. *Wade*, *supra*, at 231–232. As a result, both photographic and corporeal identifications create grave dangers that an innocent defendant might be convicted simply because of his inability to expose a tainted identification. This being so, considerations of logic, consistency and, indeed, fairness compel the conclusion that a pretrial photographic identification, like a pretrial corporeal identification, is a "critical stage" of the prosecution at which [the accused is] 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *United States* v. *Wade*, *supra*, at 237, quoting *Powell* v. *Alabama*, *supra*, at 57.

IV

Ironically, the Court does not seriously challenge the proposition that presence of counsel at a pretrial photographic display is essential to preserve the accused's right to a fair trial on the issue of identification. Rather, in what I can only characterize a triumph of form over substance, the Court seeks to justify its result by engrafting a wholly unprecedented—and wholly unsupportable—limitation on the Sixth Amendment right of "the accused . . . to have the Assistance of Counsel for his defense." Although apparently conceding that the right to counsel attaches, not only at the trial itself, but at all "critical stages" of the prosecution, see *ante*, at 9–11, the Court holds today that, in order to be deemed "critical," the particular "stage of the prosecution" under consideration must, at the very least, involve the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel." A pretrial photographic identification does not, of course, meet these criteria.

In support of this rather crabbed view of the Sixth Amendment, the Court cites our decisions in *Coleman* v. *Alabama*, 399 U. S. 1 (1970), *Massiah* v. *United States*,

377 U. S. 201 (1964), *White* v. *Maryland*, 373 U. S. 59 (1963), and *Hamilton* v. *Alabama*, 368 U. S. 52 (1961). Admittedly, each of these decisions guaranteed the assistance of counsel in pretrial proceedings at least arguably involving the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused required the "guiding hand of counsel."[11] Moreover, as the Court points out, these decisions are consistent with the view that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by an experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938). But, contrary to the Court's assumption, this is merely one *facet* of the Sixth Amendment guarantee, and the decisions relied upon by the Court represent, not the boundaries of the right to counsel, but mere applications of a far broader and more reasoned understanding of the Sixth Amendment than that espoused today.

The fundamental premise underlying *all* of this Court's decisions holding the right to counsel applicable at "critical" pretrial proceedings, is that a "stage" of the prosecution must be deemed "critical" for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary "to protect the fairness of *the trial*

[11] *Coleman*, *White*, and *Hamilton*, guaranteed the assistance of counsel at preliminary hearings and arraignments. *Massiah* held that incriminating statements of a defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant. Thus, it is at least questionable whether *Massiah* involved a "*trial-like* confrontation" with the Government.

itself." *Schneckloth* v. *Bustamonte*, —— U. S., ——, —— (1973) (emphasis added). Thus, in *Hamilton* v. *Alabama*, *supra*, for example, we made clear that an arraignment under Alabama law is a "critical stage" of the prosecution, not only because the accused at such an arraignment requires "the guiding hand of counsel," but, more broadly, because "[w]hat happens there may affect the whole trial." *Id.*, at 54. Indeed, to exclude counsel from a pretrial proceeding at which his presence might be necessary to assure the fairness of the subsequent trial would, in practical effect, render the Sixth Amendment guarantee virtually meaningless, for it would "deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Massiah* v. *United States*, *supra*, at 204, quoting *Spano* v. *New York*, 360 U. S. 315, 326 (1959) (DOUGLAS, J., concurring); *see Escobedo* v. *Illinois*, 378 U. S. 478, 484–485 (1964).

This established conception of the Sixth Amendment guarantee is, of course, in no sense dependent upon the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel." On the contrary, in *Powell* v. *Alabama*, 287 U. S. 45 (1932), the seminal decision in this area, we explicitly held the right to counsel applicable at a stage of the pretrial proceedings involving *none* of the three criteria set forth by the Court today. In *Powell*, the defendants in a State felony prosecution were not appointed counsel until the very eve of trial. This Court held, in no uncertain terms, that such an appointment could not satisfy the demands of the Sixth Amendment, for "'[i]t is vain . . . to guarantee [the accused] counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.'" *Id.*, at 59. In other words, *Powell*

made clear that, in order to preserve the accused's right to a fair trial and to "effective and substantial" [18] assistance of counsel at that trial, the Sixth Amendment guarantee necessarily encompasses a reasonable period of time before trial during which counsel might prepare the defense. Yet it can hardly be said that this preparatory period of research and investigation involves the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel."

Moreover, despite the Court's efforts to re-write *Wade* so as to suggest a precedential basis for its own analysis,[19] the rationale of *Wade* lends no support whatever to today's decision. In *Wade*, after concluding that compelled participation in a lineup does not violate the accused's right against self-incrimination,[20] the Court addressed the argument "that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined." *Wade* v. *United States*, *supra*, at 223–224. The Court then surveyed the history of the Sixth Amendment, and specifically concluded that that Amendment

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[18] *Powell* v. *Alabama*, *supra*, at 53.

[19] See *ante*, at 13–16. In an effort to justify its contention that *Wade* itself in some way supports the Court's wooden analysis of the counsel guarantee, the Court points to the so-called "careful limitation of the Court's language [in *Wade*] to 'confrontations.'" *Ante*, at 15. But *Wade* involved a lineup which is, of course, a "confrontation." Thus, it is neither surprising, nor significant, that the Court interchangeably used such terms as "lineup," "confrontation" and "pretrial identification" as descriptive of the facts. Indeed, the *Wade* dissenters recognized that *Wade* logically applies, not only to lineups, but "to any other techniques employed to produce an identification . . . ." *United States* v. *Wade*, *supra*, at 251 (WHITE, J., dissenting in part and concurring in part).

[20] See *United States* v. *Wade*, *supra*, at 221–223.

guarantees "counsel's assistance *whenever* necessary to assure a meaningful 'defense.'" *Id.*, at 225 (emphasis added). Then, after examining this Court's prior decisions concerning the applicability of the counsel guarantee,[11] the Court stressed once again that a pretrial proceeding is a "critical stage" of the prosecution if "the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.*, at 227.

The Court next addressed the Government's contention that a lineup is "a mere preparatory step in the gathering of the prosecution's evidence, not different—for Sixth Amendment purposes—from various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like." *Id.*, at 227. If the Court in *Wade* had even the remotest intention of embracing the wooden interpretation of the Sixth Amendment ascribed to it today, it could have rejected the Government's contention simply by pointing out the obvious fact that such "systematized or scientific analyzing" does not in any sense involve the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the

[11] See *id.*, at 225–227. The Court's quotation of *Escobedo* v. *Illinois*, *supra*, is particularly instructive:

"The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination' . . . . 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."' " *United States* v. *Wade*, *supra*, at 226, quoting *Escobedo* v. *Illinois*, *supra*, at 487–488.

accused requires the "guiding hand of counsel." But the Court offered not even the slightest hint of such an approach. Instead, the Court reasoned that, in light of the scientific nature of such analyses,

> "the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; *they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.*" *Id.*, at 227–228 (emphasis added).

Finally, after discussing the dangers of misidentification arising out of lineup procedures and the difficulty of reconstructing the lineup at trial, the Court noted that "[i]nsofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." *Id.*, at 235. The Court therefore concluded that "[s]ince it appears that there is a grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Id.*, at 236–237.

Thus, contrary to the suggestion of the Court, the conclusion in *Wade* that a pretrial lineup is a "critical

stage" of the prosecution did not in any sense turn on the fact that a lineup involves the physical "presence of the accused" at a "trial-like confrontation" with the Government. And that conclusion most certainly did not turn on the notion that presence of counsel was necessary so that counsel could offer legal advice or "guidance" to the accused at the lineup. On the contrary, *Wade* envisioned counsel's function at the lineup to be primarily that of a trained observer, able to detect the existence of any suggestive influences and capable of understanding the legal implications of the events that transpire. Having witnessed the proceedings, counsel would then be in a position effectively to reconstruct at trial any unfairness that occurred at the lineup, thereby preserving the accused's fundamental right to a fair trial on the issue of identification.

There is something ironic about the Court's conclusion today that a pretrial lineup identification is a "critical stage" of the prosecution because counsel's presence can help to compensate for the accused's deficiencies as an observer, but that a pretrial photographic identification is not a "critical stage" of the prosecution because the accused is not able to observe at all. In my view, there simply is no meaningful difference, in terms of the need for attendance of counsel, between corporeal and photographic identifications. And applying established and well-reasoned Sixth Amendment principles, I can only conclude that a pretrial photographic display, like a pretrial lineup, is a "critical stage" of the prosecution at which the accused is constitutionally entitled to the presence of counsel.